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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT

Petitioner

v.

MOHEGAN TRIBE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did those sections of a series of Acts entitled "An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontier", which sections restricted the alienation of Indian land without Congressional Consent, apply throughout the United States, or was their application limited to Indian country so as to deny subject matter jurisdiction to the Federal Court?

2. If the Alienation of Land Sections of the Acts applied throughout the United States, did the lower court err in not finding that the "surrounded by settlements of citizens of the United States" section applied to land transactions between the Mohegan Tribe and the State of Connecticut so as to exempt Connecticut from all the other provisions of the Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State of Connecticut hereby petitions that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Second Circuit entered in this case on December 17, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit (App. A, *infra*, 1a-29a), issued on December 17, 1980, and is not yet officially reported.

The Opinion of the United States District Court for the District of Connecticut issued on January 17, 1980, (App. B, *infra*, 30a - 52a), appears at 483 F.Supp. 597.

JURISDICTION

The Decision of the Court of Appeals, affirming the Order of the United States District Court which denied petitioner's Motion to Dismiss, was entered December 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the various sections of the Indian Trade and Intercourse Act of 1790 and its successor Acts.[1] Each Act is set forth in its entirety in App. C, *infra*, 53a - 91a).

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[1]Temporary Acts were passed July 22, 1790, Ch. 33, 1 Stat. 137; March 1, 1793, Ch. 19, 1 Stat. 329; May 19, 1796, Ch. 30, 1 Stat. 469; and March 3, 1799, Ch. 46, 1 Stat. 743. Permanent Acts were passed March 30, 1802, Ch. 13, 2 Stat. 139 and June 30, 1834, Ch. 161, 4 Stat. 729. The present statute is 25 U.S.C. 177.

STATEMENT

Members of the Mohegan Tribe were living on lands in the northeast section of the Town of Montville, Connecticut, lands which were sequestered for their use by the Plantation and Colony of Connecticut sometime before the date of the passage of the first Act to Regulate Trade and Intercourse with the Indian Tribes. After July 22, 1790 land sales were made in the Mohegan sequestered lands without a public treaty held under the authority of the United States.

On August 29, 1977, the Tribe brought a civil action praying for possession of the above lands and such other relief as the Court deems just claiming a violation of Section 4 of the Act of July 22, 1790, Ch. 33, 1 Stat. 137, which reads as follows:

> "Sec. 4. *And be it further enacted*, That no sale of lands made by any Indians, or any nation or tribe of Indians, within the United States, shall be valid to any person or persons, or to any State, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

The Mohegan Tribe also claimed violation of successor sections to Section 4, which alienation of land sections contain somewhat similar language.

The State of Connecticut moved to dismiss for lack of subject matter jurisdiction on two grounds:

First, whether the Indian Trade and Intercourse Act of 1790 and its successor Acts [hereinafter called the Act(s)], particularly those sections dealing with the alienation of lands, applied throughout the United States, including the original thirteen states, or were confined to Indian country, a place either defined in the Act, by treaty, or by both.

The other question before the Court was whether Section 13 of the 1793 Act and Section 19 of the 1796, 1799 and 1802 Acts, the so-called "surrounded by settlements of citizens of the United States" sections,[2] excepted the State of Connecticut from all the other restrictive sections of the Acts, including the alienation of land section.

The District Court, while admitting certain sections of the Act had limited territorial applicability, held that the plain language of the alienation of land section gave it force within the bounds of the United States. Is also held that "the surrounded by settlements" exception only applied to individual Indians and not to tribes, citing as authority, *Narragansett Tribe v. Southern Rhode Island Land Development Corporation*, 418 F.Supp. 790, 808, 809 (1976).

Because the questions raised were novel and had never been directly decided by any federal court, the District Court certified an interlocutory appeal pursuant to 28 U.S.C. 1292(b) which the Court of Appeals consented to hear.

The Court of Appeals agreed with the District Court that some of the sections of the Act were territorially limited, but the section dealing with the alienation of land applied throughout the United States. It had more trouble with the "surrounded by settlements" exception disagreeing with the basis of the District Court Decision that the section applied only to individual Indians and not tribes. Instead the Court of Appeals held that the "surrounded by settlement" exception, although it might apply to all other sections of the Act, was not meant to apply to land transactions.

On December 17, 1980, the Court of Appeals affirmed the Decision of the District Court.

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[2]For an example of this section, see Act of March 3, 1799, Section 19, Ch. 46, 1 Stat. 743, set out in full in App. C, *infra*, 73a.

REASONS FOR GRANTING THE WRIT

I

LONGSTANDING LEGAL RELATIONSHIPS ARE THROWN IN DOUBT

Not only does the case present novel questions of law never before this Court, but allowing a civil action such as this disturbs land transactions, some of which have gone unquestioned for nearly two centuries.

The questions are of importance to many of the old eastern states[3] which exercised jurisdiction over the Indians from Colonial times on lands never ceded to the National Government, not only with no interference from Congress, but with many actions on the part of the Executive Branch indicating its belief that the Acts had limited territorial application.

II

THE ACTS, READ AS A WHOLE, INDICATE ALL THE PROVISIONS WERE TO APPLY ONLY IN INDIAN COUNTRY

Although the District Court conceded "that at no time between 1790 and the present have the Mohegans been residents of 'Indian country' ",[4] it held that the plain meaning of the alienation of land section should not have that limited territorial applicability urged by the petitioner which confined all provisions of the Acts to Indian country, but rather held it should apply throughout the states.

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[3]The Court of Appeals indicated that there were many suits brought in the eastern states concerning land rights which have thrown into uncertainty the validity of land titles. See *Catawba Tribe of South Carolina v. State of South Carolina*, United States District Court for the District of South Carolina, Civil Action No. 80-2050-6 and *Seminole Indians of Florida v. State of Florida*, United States District Court, Southern District of Florida, Case No. 78-6116-Civ.-N.R.

[4]App. B, *infra*, 31a.

By limiting itself to the literal language of the alienation of land section, the Court ignored a cardinal rule of statutory construction that in order to determine the intent of Congress, the statute should be read as a whole. Indeed, in a recent decision, bearing on the interpretation of the Indian legislation, the Supreme Court rejected the notion that Congressional intent is to be determined by examining only the wording of the statutory section in question.

> "The complaintants' reliance on the literal language of § 4(e) and on the so-called 'plain meaning' rule of statutory construction is not entirely unpersuasive. But this assertion [as to the nonambiguity of the statute] is refuted when § 4(e) is *read together with the rest of the Act, as, of course, it must be.*" *Chemeheuvi Tribe v. Federal Power Commission*, 420 U.S. 395, 403 (1975) (emphasis added).

When the various Indian Trade and Intercourse Acts are construed as a whole, one must conclude that Congress intended all the sections within the Act apply solely in Indian country.

While both the 1790 and 1793 Acts referred at times to "Indian country", that term was not defined. However, the 1796, 1799 and 1802 Acts did describe an "Indian Boundary Line" by delineating in the first sections of those Acts a geographical boundary line based upon treaties entered into between Indian tribes and the federal government. The first section of those statutes concluded with the following significant proviso:

> "Provided always, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then *all the provisions contained in this act*, shall be construed to apply to the said line so

> to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited."[5]

The insertion of the language "all the provisions contained in this Act" strongly suggests that Congress intended the Acts, in their entirety, to apply solely in Indian country.

Because of the language "in the same manner as said provisions now apply to the boundary line herein before recited", the District Court and Court of Appeals believed that the "manner" in which the boundary line applies may not be uniform from section to section throughout the Act.

There are two problems with the lower courts' interpretation. First, if they are correct, it would seem Congress would have used the words "then each provision contained in this section . . . as said provisions now apply to the boundary line herein before recited" instead of the all encompassing "all provisions".

Second, because the 1790 and 1793 Acts contained no boundary line language, one must conclude that the proviso was referring to the prior language in the same section and merely stating as the boundary to the Indian country moved west with the change in treaties, then all the provisions which presently apply to the 1796 boundary would equally apply to the new boundary. There appears to be no language in the Acts or their surrounding history to give the results reached by the lower courts.

In addition, a more general examination of all the provisions in the various Acts indicates the intent of Congress. No rational reason can be deducted from the face of the Acts why Congress would prohibit certain activities, such as hunting over the Indian country boundary line[6] or buying a horse with-

[5]Act of May 19, 1796, Ch. 30, Sec. 1, 1 Stat. 469. (Emphasis added).

[6]Act of March 30, 1802, Ch. 13, Sec. 2, 2 Stat. 139.

out a special license only in Indian country[7] and yet proscribed other transactions, such as buying or bartering instruments of husbandry or cooking utensils, throughout the United States,[8] thus extending the latter prohibitions to tribes generally.

It would be paradoxical to conclude that Congress would allow white citizens in Connecticut to hunt on Mohegan lands, when hunting was of great importance to all Indians, and to trade horses with the Mohegans because Sections 2 and 10 confined these activities solely to Indian country, but would forbid these same white Connecticut citizens from bartering instruments of husbandry and cooking utensils with the Mohegans because Section 9 does not contain words confining the activities set forth in that particular Section to Indian country.

Yet, following the District Court's rationalization of looking at each section to discern its territorial applicability, one must reach this strained and unrealistic result. Therefore, it must be assumed that Congress had a rational legislative scheme in mind when enacting these statutes, and this assumption gives further support to the view that Congress intended all provisions of the Acts to apply only to Indian country, rather than intending some sections to apply only to Indian country and others to apply throughout the United States.

Of interest is the fact that Congress used language similar to the "within the United States" of Section 4 of the Act of 1790 in another statute yet contemporary interpretation was that the statute applied only in Indian country.

In March of 1795 Congress passed a trial measure. It appropriated money for that year for the purpose of goods ". . . for supplying *the Indians within the limits of the United States* . . . ." (emphasis added) 1 U.S. Stat. 443. If read literally, the statute would have appeared to have been applicable throughout the United States — both within and without Indian country. But this was not the opinion of the Secretary of War. In

[7]Act of March 30, 1802, Ch. 13, Sec. 10, 2 Stat. 139.

[8]Act of March 30, 1802, Ch. 13, Sec. 9, 2 Stat. 139.

December of 1795, pursuant to the direction of President Washington, Secretary of War Timothy Pickering reported to the President of the United States and President of the Senate. In his report Pickering clearly indicated that the only Indians Congress intended to include under the experimental 1795 law were Indians in Indian country; to wit, the Six Nations, the tribes northwest of the Ohio River, and the four southern tribes (Creeks, Cherokees, Chickasaws, Choctaws). *American State Papers – Indian Affairs*, Vol. I, p. 583-584.

An example of the danger of using the "clear language" argument is shown where the Court of Appeals referred to Section 9 of the 1793 Act as being without geographical limitation. (App. C, *infra*, 59a). A full reading of that Section shows that the provision was to be carried out by agents. All the agents, during the periods that the various Acts were passed, were on the frontier; none were in the old New England States. (See for example *American State Papers – Indian Affairs*, Vol. 2, Document 188, page 364 et seq. See also Petitioners Brief, footnote 33, *infra*, 42).

This section was interpreted by the Executive Department as applying only in Indian country as Document 188 points out, yet the language of Section 9 never changed in any of the subsequent Acts. It is obvious despite the lack of language limiting geographical application that Section 9 was not meant to apply throughout the United States.

III

THE ACTS WERE PASSED TO PRESERVE PEACE ON THE FRONTIER.

Because of this ambiguity between the individual sections of the Act, and the Act read as a whole, one must turn to the object and purpose of the Act. *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907). This involves an analysis of the problems which induced the enactment of the statute and a review of the general history of the period preceding its passage. The United States Supreme Court has consis-

tently employed this method of analysis when dealing with legislation relating specifically to Indians.

In its recent decision in *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 at 206 (1978), the Supreme Court reaffirmed this analytical mode.

> "[t]hese instruments [legislation and treaties relating to Indians] . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

This principle has been affirmed and restated in *Wilson v. Omaha Indian Tribe*, 99 S.Ct. 2529, 2537 (1979).

Petitioners believe the sole overriding purpose of the Acts was to maintain peace on the frontier with those powerful tribes that had never submitted themselves to the jurisdiction of either the states or the National Government. If petitioners are correct, there is no reason why the Act should have application anywhere but along the Indian boundary.

The lower courts concede that maintaining peace and preventing encroachment onto Indian lands was the primary object of the Acts[9] but state this was probably not the sole purpose. Yet neither court points to any other purpose.

With the exception of the 1790 and 1793 Acts, all the later Acts were entitled "An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers".

Although substantial weight is usually not given to the title of an Act, the Courts will normally look to the title as a useful guide in interpreting the meaning and purpose of the legislation. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1891); *Smythe v. Fiske*, 90 U.S. 374, 380 (1874).

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[9]App. A, *infra*, 18a, and App. B, *infra*, 43a.

Of far more significance is the fact that the architects of the first Acts, President George Washington and his Secretary of War, Henry Knox, proposed them for the purpose of maintaining peace between this country and the powerful tribes on the western frontier[10] as these men well knew that the United States could not afford a whole-scale war which would be caused by the pressure of white settlers going into the lands of the frontier tribes.[11]

Certainly, it was cheaper in lives and money to prevent the intrusion of whites into Indian country, which was the underlying reason for the Indian unrest. No wonder Henry Knox, reporting to Congress on the problem, stated:

> "Although the disposition of the people of the States to migrate into Indian country cannot be effectually prevented, it may be restrained . . . by prohibiting the citizens from intruding on Indian lands." *American State Papers-Indian Affairs*, Vol 2, page 53.

According to Prucha, "the legislation [The Acts] was, rather directed against the lawless whites on the frontier and sought to restrain them from violating the sacred treaties made with the Indians." *Prucha, supra*, page 48, n. 32.

Not only did Prucha indicate the purpose of the Act, but it is important to note that he particularly refers to *Indian country* as being located on the frontier.

> "These laws, which are originally designed to implement the treaties and enforce them against obstreperous whites, gradually came to embody the

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[10]Francis Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834*, (1962), pages 43-45. Father Prucha's book was cited as authoritative in this field in *Wilson v. Omaha Indian Tribe, supra*, page 2536, n. 15.

[11]See George Harmon, *Sixty Years of Indian Affairs*, pages 32, 33, on the cost in lives and money in the Indian campaigns of Generals Harmon and St. Clair.

> basic features of federal Indian policy. The first [the 1790 Act] . . . struck directly at the current frontier difficulties. To prevent the steady eating away at the *Indian Country* by individuals who privately acquired lands from the Indians, it declared the purchase of lands from the Indians invalid unless made by a public treaty with the United States." *Prucha, supra*, page 45, n. 32. (emphasis added).

Every recognized authority in the field has reached a like conclusion that the purpose of the Acts was to maintain peace with the powerful frontier tribes. In a text commissioned by the United States Department of Interior, Professor S. Lyman Tyler states:

> "[T]he maintenance of peace and of friendly relations was the first consideration of both Washington and Knox, but it was soon apparent that it took more than treaties to control the activities of those who resided on the frontier and regularly offended the Indians. The continuing requests for the executive branch for Congressional action to meet this problem were met by a series of laws 'to regulate trade and intercourse with the Indians.' "[12]

President Washington's policy in preserving peace on the frontier is shown in his dealings with Congress pushing for said legislation.

In his message to the Gentlemen of the Senate on August 7, 1789, Washington stated:

> "But the disputes which exist between some of the United States and several powerful tribes of Indians

[12]S. Tyler, *A History of Indian Policy*, page 39 (1973). The same conclusion is also reached by R. Horsman, *Expansion and American Indian Policy 1783-1812* at page 62 (1967) and Felix Cohen, *Handbook of Federal Indian Law*, pages 69-70 (1971 ed.). Cohen was also recognized as an authority by the *Wilson* Court. *Wilson, supra*, page 2536, n. 15.

> within the limits of the Union, and the hostilities, which have in several instances been committed on the frontiers, seem to require the immediate interposition of the General Government . . .". James Richardson, *Messages and Papers of the Presidents*, Volume I, pages 59-60.

In his First Annual Address on January 8, 1790, Washington discussed measures necessary to pacify the hostile tribes of Indians on the frontiers. *Richardson, ibid*, page 65. In every Annual Address thereafter, President Washington spent considerable time which was devoted to measures taken or to be taken to maintain peace on the frontier suggesting the legislation necessary to accomplish this task.

Probably the clearest message that the Trade and Intercourse Acts were passed solely for this purpose is found in Washington's Third Annual Address on October 25, 1791:

> "In the interval of our recess due attention has been paid to the execution of the different obligations which were specifically provided for by the *laws* and resolutions of the last session . . .
>
> Among the most important of these is the defense and security of the western frontiers . . ." *Richardson*, Vol. I, page 104 (emphasis added).

The importance of this part of the Third Annual Address cannot be overemphasized. The session referred to by Washington was the session of the First Congress between March 3, 1789 and March 3, 1791, when Congress had passed the Act of 1790. The recess referred to started on March 4, 1791 and ended October 24, 1791, the day before the Third Annual message. It is obvious from Washington's language that "the laws" passed by the First Congress to effect the "defense and security of the western frontiers" must have applied to the Act of 1790.

Again, in the Fourth Annual Address on November 6, 1792, immediately before the passage of the Act of 1793,

Washington urged the Congress to pass laws enforcing peace on the frontiers.

> "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provisions for giving energy to the laws throughout our interior frontier." *Richardson, ibid.* pages 125-129 at 126.

The exchange between Washington and the Senate shortly after the passage of the Act of 1796 is of great significance as to the Senate's understanding of the purpose of the Act and the *geographical area of its application.*

> "We are fully sensible of the advantages that have resulted from the adoption of measures that you have successfully carried into effect to preserve peace, cultivate friendship and promote civilization amongst the Indians on the western frontiers." Address of the Senate to George Washington, President of the United States (December 10, 1796) *Richardson, ibid.* page 205.[13]

IV

CONSISTENT EXECUTIVE BRANCH INTERPRETATION WAS THAT THE ACTS DID NOT APPLY IN CONNECTICUT

Not only did the architects of the Acts believe the purpose of the Acts was to maintain peace on the frontier and to enforce treaty rights, there has been a consistent interpretation[14] by the Executive Branch since the earliest days of this Nation that the Acts did not apply to the tribal remnants in the old New Eng-

[14] "Longstanding, contemporaneous executive and administrative interpretation by those entrusted with the enforcement of ambiguous legislation may also shed light upon an appropriate construction." *Leary v. United States*, 395 U.S. 6, 25 (1969).

land States because these Indians were under the jurisdiction of the individual states.

In 1792 Archbishop John Carroll of Baltimore requested an appropriation of funds to provide Catholic priests for various tribes including those in New England. Washington replied approving, in principle, the request as far as it applied to the tribes on the western frontier. As for the New England tribes, the President indicated the federal government had neither the responsibility nor authority to provide for them.

> "[T]hose who dwell in the eastern extremity of the United States, are, according to the best information that I can obtain, so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protections." P. Guilday, *The Life and Times of John Carroll* 607 (1954).

One may also look to the actions of numerous cabinet level officers. During the period from 1790 to 1812, six men served as Secretary of War, with the responsibility at that time for the administration of Federal Indian policy and the enforcement of the Trade and Intercourse Acts. Five of these six Secretaries were Massachusetts' citizens.[15]

Yet, during this period, Massachusetts without federal approval entered into separate treaties with the Passamaquoddy and Penobscot Indians involving enormous amounts of land, and between 1790 and 1802, the Connecticut General Assembly, on at least 13 occasions, executed 13 sales of Indian lands.[16]

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[15]Henry Knox, 1790-1795; Timothy Pickering, 1795-1796; Samuel Dexter, 1799-1801; Henry Dearborn, 1801-1809; William Eustis, 1809-1812.

[16]See Public Records of the State of Connecticut, Charles Hoadley, et al, Editors, Vol. VII, Pages 39, 142, 524; Vol. VIII, Pages 42, 122, 352; Vol. IX, Pages 376, 413; Vol. X, Pages 50, 250, 251; Vol. XI, Pages 95, 177 and 249.

It would seem inconceivable that these Secretaries of War would have been ignorant of these land transactions, and knowing of them, as they should, would have done nothing if they believed the Acts applied in the original New England States. This complete inaction also applied to Congress. During many of the debates in Congress over the passage of some of the Acts, James Hillhouse from Connecticut, who served as Chairman of the committee considering the 1796 Act, was a strong advocate of its passage.[17] One would have to be politically naive to believe Congressman Hillhouse would have pushed legislation which would put a cloud on the title of Connecticut land transactions which were then taking place.

The District Court shrugged off this argument claiming Congress would not pay much attention to a handful of land sales in Connecticut. But, these sales had to be meaningful. Congressman Hillhouse was born and brought up in Montville and his brother, William Hillhouse, was the overseer of the Mohegan Tribe.[18] It is inconceivable that a politically active family of lawyers, such as the Hillhouses, would not know the consequences of the alienation of land section of the Acts. It has to be obvious, that like all their contemporaries, the Hillhouses knew the Acts applied only in Indian country.

The various Secretaries of War, who handled Indian Affairs, recognized jurisdiction by certain states over Indian lands. Henry Knox, writing to President Washington on July 7, 1789, concerning steps to be taken to maintain peace on the frontier, recognized the state's rights to Indian lands.

> "Each individual state indeed will retain the right to preemption of all the lands within its limits which shall not be abridged . . ." *American State Papers – Indian Affairs*, Vol. 1, page 53.

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[17]Annals of Congress, Vol. V, pages 893, 897-899.

[18]Henry Baker, *History of Montville, Connecticut* 1640-1896, pages 554-562. Records of State of Connecticut, Vol. VI, pages 4, 5; Vol. VII, page 37.

When President Monroe was preparing his Preparation of a Plan for Removing of the Several Indian Tribes West of the Mississippi River, he requested Secretary of War, Colhoun, to get the names of the Indian tribes now remaining in the territories east of the Mississippi, their numbers, the quantity of land claimed by each and the amount of appropriations necessary to settle their claims and move these tribes west of the Mississippi.

Calhoun, in his report to Monroe dated January 24, 1825, asked whether the New England Indians were to be exempted from those tribes which were to be recompensed for their land and moved west.

> "The arrangement for the removal, it is presumed, is not intended to comprehend the small remnants of tribes in Maine, Massachusetts, Connecticut, Rhode Island, Virginia and South Carolina amounting to 3,023." *American State Papers – Indian Affairs*, Vol. I, page 542.

On those occasions where the various Commissioners of Indian Affairs had occasion to discuss the Act, they were of the opinion that the Act applied only in Indian country with the purpose of preserving peace on the frontier.

In his 1830 report to Congress, Commissioner of Indian Affairs Hamilton recommended a change in the 1802 boundary line. In doing so he observed:

> "It is believed that the line defined by the Act of 1802 as the Indian boundary, *and to which its provisions are intended particularly to apply*, has long since ceased to be so." Welcomb Washburn, *The American Indian and the United States: A Documentary History*, pages 16-17 (1973) (emphasis added).

In 1831 Hamilton's successor, Elbert Herring, made the same recommendation about the boundary line as Hamilton and commented:

> "Our relations with the Indian Tribes are mainly governed by the act for Congress of 1802, to regulate trade and intercourse with them and *to preserve peace on the frontier*. The boundary line, defined by the act, and to which its provisions were applicable, has been carried by subsequent treaties; and the increase of our population, and the extension of our settlement have effected changes calling for a revision of that act, that its provisions may be adapted to the present state of our Indian relations." *Washburn, ibid,* page 21 (emphasis added).

Joseph Blunt, who was a contemporary authority on federal Indian policy, was the editor of the *American Annual Register*. In the *Register* Blunt published an article, presumably written by him, which discussed Indian tribes during the Articles of Confederation period. The article noted that

> "[i]t was indeed easy to discriminate between the powerful southern and northwestern tribes, who claimed to be independent, and by their number and courage afforded substantial evidence of the strength of their claim; and those feeble remnants that were found in the eastern and middle states, and the Indian reservation. These tribes, whose numbers seldom amounted to a hundred families, deprived of the power of sustaining themselves, partially civilized, and accustomed to depend upon the protection and humane care of the local authorities, were properly considered as members of the states where they resided." *II American Annual Register*, page 72 (1827-1829)

Commissioners of Indian Affairs in the late 19th and 20th centuries were firmly of the opinion that Indians in Connecticut were not under federal jurisdiction but were "state" Indians

and should look to the State of Connecticut to solve their problems.[19]

This inaction, by itself, is entitled to substantial weight in determining whether the federal government ever believed that the Trade and Intercourse Acts ever applied in the old eastern states. It is also part of the jurisdictional history of the Acts, and, as such, is an important tool of statutory construction to interpret legislative intent. In a recent decision, involving state jurisdiction over Indian lands, the Supreme Court looked to both legislative and executive inaction as a tool in the jurisdictional history of the Act.

> "Although the subsequent 'jurisdictional history' . . . is not entirely clear, the single most salient fact is the unquestioned actual assumption of state jurisdiction over the [lands in issue] since the passage of the 1904 Act . . . Since state jurisdiction over the area within a reservation's boundaries is quite limited, . . . the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history'. The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as [the Tribe] urges." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-605 (1977).

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[19]See letter of July 10, 1899 from W. Jones, Commissioner of Indian Affairs to Francis Morrison, Esq., App. D, *infra*, 92a - 94a and also the letter of Commissioner C. J. Rhoads dated October 12, 1931 to Mrs. Edith Smith, App. E, *infra*, 95a.

V

THE PREVAILING CASE LAW HOLDS THAT ALL PROVISIONS OF THE ACTS APPLY ONLY IN INDIAN COUNTRY

Although this Court has never had the occasion to interpret the alienation of land section of the Act and its geographical application, there are several cases that hold all provisions of the Act are confined in their application to Indian country.

The first case to so hold discussed Section 1 of the Act of 1802 which specifically described the boundaries of Indian country. The case, the *American Fur Company v. United States*, 2 Pet 357 (1829), involved an appeal over a jury instruction in the lower court on whether or not a trader forfeited all his goods, those within and without Indian country, when spiritous liquors were concealed within the goods or whether he only forfeited those goods found in Indian country. The Supreme Court ordered the lower court to instruct the jury that the only goods to be seized and forfeited were those goods found in Indian country as said country was described in Section 1 of the Act. The Court further made the specific finding that *all* the provisions of that Act applied to said boundary line.

> "The first commences in the 1st section, by declaring that a certain boundary line, therein described in general terms, as established by treaty between the United States and various Indian tribes, shall be clearly ascertained, . . . with a proviso, that if the boundary line between the said Indian tribes and the United States should at any time thereafter be varied, by any treaty which should be made between the said Indian tribes and the United States, then all the provisions contained in that Act should be construed to apply to the said line, so to be varied in the same manner as the said provisions apply, by force of that Act, to the boundary line therein before recited." *American Fur Company, supra*, page 365.

Of more significance was the holding of the Court that not only did all the provisions of the Act apply to Indian country but that all the provisions of the Act were expressly *confined* to Indian country as defined in Section 1 of the Act.

> "[B]ut lying without the boundaries of the Indian country, as they are described by the 1st section of the Act of 1802; to which *all the provisions* contained in that Act, and consequently those contained in the amendatory Act of 1822, are by that section *expressly confined.*" *American Fur Company, supra,* page 369. (emphasis added).

The term "expressly confined" is of utmost importance because one could argue a statute could expressly apply to Indian country yet by implication apply elsewhere. However, when the Court holds that all the provisions of an Act are *expressly confined* to Indian country, it is obvious that the provisions can apply nowhere else either by implication or any other means.

In 1877 the Supreme Court reached the same conclusion in *Bates v. Clark*, 95 U.S. 204, 205 (1877):

> "[The Trade and Intercourse Act of 1834,] which is a very long and important act, begins by *describing in its first section the country or territory in which that act shall be operative*. [The Court quotes section 1 of the Act, which describes that portion of the United States which shall] '. . . for the purposes of this act, be taken and deemed *Indian country*.' " (emphasis added).

It is important to note that *Bates* used the phrase "in which that act shall be operative" not "in which certain sections of the act shall be operative" nor "that section of the act shall be operative". The latter language would have been more appropriate if only some sections had that limited territorial applicability.

Bates cited *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876), where the Court held a treaty or some other Act of Congress could take a case out of Section 1 of the 1834 Act, which Section described the boundaries of Indian country. In this latter case, Justice Davis said he believed Congress had the power to enlarge what is Indian country in those lands that had been *ceded* to the United States but that Congress had not, in fact, seen fit to do so. However, he found that the circumstances of the case were covered by specific treaty reservations thus taking it out of the "Indian country" exception set forth in Section 1 of the 1834 Act.

Connecticut, of course, ceded no land within its boundaries to the United States, and the United States had no treaty with the Mohegans.

The defendants cited the recent decision of *Wilson v. Omaha Tribe* to the District Court as indicative of this limited territorial applicability although the section before the *Wilson* Court for interpretation contained no limiting language. The District Court held *Wilson* was not relevant, in part because it didn't involve 25 U.S.C. 177, and also because Section 22, the Section before the *Wilson* Court, was not added until 1822 and thus lacked a history of prior enactments. This argument is not well taken. A careful reading of *Wilson* shows the use of the following all inclusive language:

> "Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194 was 'intended to apply to the whole Indian country, as defined in the first section . . . .'
>
> [I]t is apparent then in adopting section 22 Congress had in mind only disputes arising in Indian country . . . .". *Wilson*, 99 S.Ct. at 2538.

It is obvious from the above language that it was the whole "1834 Act, which included Section 22" that was limited to Indian country and not just Section 22 of that whole Act.

In *Worcester v. Georgia*, 31 U.S. 515 (1832), C. J. Marshall appears to limit United States sovereignty to "territorial boundaries", *Worcester, supra*, page 557, and again to "a boundary line established by treaties", *Worcester, supra*, page 560.

C. J. Marshall was also careful to make other observations which distinguished *Worcester* from the present civil action. On page 536 he points out that the Cherokee had denied the jurisdiction of Georgia, and, in fact, Georgia never attempted to exercise jurisdiction over the Cherokee for approximately the first 30 years of this country's existence. On page 552, he observes that the Cherokees acknowledged themselves to be under the protection of the United States and no other power, something that they had done on their surrender immediately after the end of the Revolutionary War. But most importantly, he points out on page 560 that the State of Georgia had acquiesced in the jurisdiction of the United States over the Cherokees by acts of the Georgia Legislature dealing with land cession. None of the above occurrences can be found in any dealings involving the Mohegans, Connecticut and the federal government.

Justice McLean, concurring in *Worcester*, stated:

> "In some of the old States — Massachusetts, Connecticut, Rhode Island and others — where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government — the laws of the State have been extended over them, for the protection of their persons and property." *Worcester, supra*, page 580.

Justice McLean's remark about these old New England tribes as being within the jurisdiction of the State and not the federal government is cited with approval in *Elk v. Wilkins*, 112 U.S. 94 (1884).

> "and which Mr. Justice McLean had in view when he observed in *Worcester v. Georgia*, 31 U.S. 515, that in some of the old states 'where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property.' See, also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities." *Elk, supra*, page 108.

The fact tribal remnants in New England had not been recognized by "treaties or legislative or executive acts of the United States" is a strong indication that the *Elk* Court did not believe the Acts applied to these tribes.

The question may arise concerning the absence of any section in the present Title 25 of the United States Code defining or delineating Indian boundaries. However, this question has been completely laid to rest in *Ex Parte Crow Dog*, 109 U.S. 556, 561 (1883). In this case, Justice Mathews, in a discussion of the fact that a specific reservation defining Indian country was no longer part of the Act, still held the definition of Indian country applied.

Justice Mathews was also explicit in stating what constitutes Indian country when discussing Section 1 of the Act of 1834. He held that Indian country did not include "any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction *by treaty or by statute at the time of its admission into the Union . . . .*" *Crow Dog, supra*, page 562. (emphasis added).

Because Connecticut entered the Union in 1789, when there was no Indian Trade and Intercourse Act in existence, Justice Mathews' decision would leave jurisdiction over the respondent exclusively in the petitioner.

The dicta in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), appears to hold differently. However, the facts in *Oneida* are different. That tribe, as well as others of the Iroqouis Nation, lay in Indian country[20] and had treaties with the Federal Government both predating and antedating the passage of the Act of 1790, treaties in which New York participated. Further, the Iroqouis were just the powerful frontier tribes at which these Acts were aimed.

Assuming arguendo that the jurisdiction of Congress over the Indian tribal land could be, or could have been, extended over all the states, including the original thirteen, it is also true that Congress can choose, or could have chosen, not to exercise its jurisdiction.

> "Since the powers of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency — state or federal — as it chooses." *United States v. Hellard*, 322 U.S. 363, 367 (1944).

Even if Congress had the authority to extend the Trade and Intercourse Acts throughout the entire United States, Congress never chose to do so. Rather, in light of the considerations previously discussed, it appears that Congress intended to limit the exercise of its jurisdiction under the Trade and Intercourse Acts to that area previously described and known as "Indian country". Because Congress chose to limit the exercise of its jurisdiction, the State of Connecticut was free to exercise its jurisdiction over the Indians occupying land in that State and to enter into land transactions with those Indians.

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[20]Secretary of War Calhoun, writing President Monroe on February 8, 1822, discussed schools established in Indian country and attached a list of the schools, including a school in the Oneida Nation. *American State Papers – Indian Affairs*, Vol. 2, Pages 275-277.

In a monograph of the Institute for Government Research of the Brookings Institution, the following conclusion was reached:

> "The power exercised by the United States has been confined to what was the frontier in 1789 and the region to the west of it, the early treaties and statutes having established a definite line between the states on the east and the Indian country on the west . . . .
>
> The theory of the complete separation of the Indian Territory from that of the states accounts for the fact that Congress did not legislate for or treat with the Indians within the thirteen original states who were not on the frontier . . . . [I]t appears to be generally agreed that if Congress does not exercise its power, the states may act . . . . Thus, Congress has never attempted to legislate for or to make treaties with the Indians in Maine; on the other hand numerous treaties were made with the southern tribes occupying the frontier in western North Carolina and South Carolina and northwestern Georgia. The powers of Congress have, therefore, been exercised only in the 'Indian Country' ". L. Schmeckebier, *The Office of Indian Affairs* 6-7 (1927).

VI

THE "SURROUNDED BY SETTLEMENTS" SECTION OF THE ACTS APPLIES IN CONNECTICUT

Both of the lower courts rejected the petitioners' argument that Section 13 of the 1793 Act and Section 19 of the 1796, 1799 and 1802 Acts, "the surrounded by settlements of citizens of the United States" exception[21] would apply in Connecticut so

[21] Section 13 is set forth in App. C, *infra*, 60a and Section 19 is set forth in App. C, *infra*, 70a, 73a, 78a.

as to allow alienation of land by the Mohegans. The Court of Appeals specifically disagreed with the reasoning of the District Court.

The District Court found that the word "Indians" as used in the above meant individual Indians and not tribe, citing *Narragansett Tribe*, supra, pages 808-809, for authority. The District Court was simply incorrect in this belief and, a starting point to refute the Court's interpretation is an analysis of a typical section.

The Act of 1799, Ch. 46, Sec. 19, 1 Stat. 743, states as follows:

> "Section 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of the road from Washington district, to Mero district, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement (so called) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said trace, after which, the penalties of this act shall be incurred by every person travelling or being found on said trace, within the Indian boundary without a passport."

The first problem with the District Court's reasoning is the language "with Indians living on lands surrounded by settlements of the citizens of the United States". It is difficult to visualize individual Indians "being *surrounded* by settlements". In order to make any sense, that phrase must apply to small tribes and tribal remnants. Individual Indians would most

likely live within the settlements of citizens of the United States. Also, Congress uses the word "Indians" again in the same Section where it has to mean "Indian Tribe" in order to give it any real sense because one finds it difficult to believe that Congress was worrying about individual Indians objecting to travelling on the trace or that the President would be issuing proclamations as a result of objections from individual Indians.

Congress uses the word "Indians" instead of "Indian Tribe" or "Indian Nation" in other Sections of the Act where it is obvious it must mean tribe or nation.

In Section 12 of the Acts of 1796, 1799 and 1802, the alienation of land section, one finds the following language:

> "*Provided, nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with *Indians*, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the *Indians*, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.' (emphasis added).

Certainly, Congress did not intend to make treaties with individual Indians, and, in fact, has never done so; yet, the word "Indians" not "tribe" or "nation" is used twice in this proviso.

Section 13 of the Act of 1802[22] discusses agents residing "among the Indians" where it is obvious from the context of that Section that agents were to reside among tribes and not among individual Indians.

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[22]App. C, *infra*, 77a.

Section 11 of the 1799 Act[23] prevents federal employees, empowered to grant licenses, from having any interest in trade with "Indians". Following the District Court's analysis, one would have to believe that Congress intended to stop Indian Superintendents from trading with individual Indians, but, because the word "tribes" was not mentioned, they could trade with Indian tribes.

The only Supreme Court case to address this issue favored the petitioner. In *Wilson v. Omaha Tribe*, an issue before the Court was whether the word "Indians" as used in the Act of May 6, 1822, an Amendment to the Act of 1802, meant individual Indians or Indian tribe. The Court held it meant tribe because land titles were usually in the tribe and not in the individuals, and the word "Indians" used at that time usually referred to the tribe. *Wilson, supra*, pages 3536-3537.

The issue of whether the respondent was surrounded by settlements of citizens of the United States would appear to create no problem. The Mohegans lived in the Town of New London until 1786 when the Town of Montville was created out of the northern section of New London and thereafter dwelt on the border of Montville and Norwich.

A third element of Section 19 is also of importance.

> "Being within the ordinary jurisdiction of any of the individual states."

In *United States v. Cisna*, 25 Fed. Cas. 422 (1835), the Court specifically stated that tribes in Connecticut would come within Section 19 of the 1802 Act, which Section excepted a tribe in the circumstances of the Mohegans from the application of the rest of the provisions of the 1802 Act.

> "In the act of 1802 is a provision that it shall not be so construed 'as to prevent any trade or intercourse with Indians living on lands surrounded by settle-

[23]App. C, *infra*, 72a.

> ments of the citizens of the United States, and being within the ordinary jurisdiction of the individual states.' This provision applied to the condition of Indians at the time the law was passed; and at that the Wyandott tribe was not only far more numerous than it now is, but its territory was extensive and remote from a white population. They did not reside within the ordinary jurisdiction of any state. *The exception was applicable to remnants of tribes which resided in Massachusetts, Connecticut, and other Eastern states.*" *Cisna, supra,* page 423. (emphasis added)

The reasoning of the Court of Appeals that the "surrounded by settlements" exception did not apply to land transactions is equally without merit. It appears to be based on the Court's belief that the proviso in Section 1 of the Act of 1790, which has somewhat similar but not as extensive language as that of Section 13 or Section 19 of the subsequent Acts, did not apply to land transactions because Section 1 of the 1790 Act appeared to be concerned only with trade.

One problem with the Court's reasoning is that Section 1 did not apply to the old New England States. As Prucha points out in his treatise in Chapter 5, entitled *The Indian Department,* all the superintendents and departments referred to in Section 1[24] were on the frontier. There was no superintendent or department in charge of licensing anything in the old New England States. Therefore, neither Section 1 or its proviso would have applied in Connecticut.

The second problem with the Court of Appeal's analysis is the addition in Section 13 and 19 of the subsequent Acts of the language "being within the ordinary jurisdiction of any of the individual states".

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[24]See particularly *Prucha, supra,* pages 50-53 for an excellent account of the Indian Department and its geographical jurisdiction. See Lawrence F. Schmeckebier, *The Office of Indian Affairs, Its History, Activities and Organization,* Institute of Government Research, Service Monographs of the United States Government, No. 48, Baltimore, 1927, pages 1 through 42.

As a result, Section 13 and 19 would appear to apply throughout the United States, and the addition of the words "within the ordinary jurisdiction", as used in their everyday sense, don't convey an intention of Congress to exclude from the states' jurisdiction land transactions because states, then as today, ordinarily had jurisdiction over land transactions within their boundaries.

One could argue that the "surrounded by settlements" exception in all the Acts only applied to Indian country because of that proviso's origin in Section 1 of the 1790 Act. However, this logic creates a dilemma. Would it then follow that Connecticut could have no trade and intercourse with Indians within its boundaries because Connecticut was not within Indian country? Or following Petitioner's argument throughout this Brief, does it reflect the belief of Congress that no Section of the Act applied outside of Indian country?

Further, Congress would have more logically accomplished the purpose given it by the Court if it left the Section 1 proviso of the 1790 Act in Section 1 of the 1793 Act or in Section 7 of the 1796, 1799 and 1802 Acts and just made those provisos mandatory instead of discretionary. The fact that Congress put this exception in a separate section and added the language on jurisdiction must have more significance than the Court of Appeals gave it.

CONCLUSION

The Petition for Writ of Certiorari shall be granted.

Respectfully submitted,

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80-1365

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT

Petitioner

v.

MOHEGAN TRIBE

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 73—September Term, 1980

(Argued September 12, 1980

Decided December 17, 1980)

Docket No. 80-7348

MOHEGAN TRIBE

Plaintiff-Appellee,

—against—

STATE OF CONNECTICUT

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge,*
LUMBARD and OAKES, *Circuit Judges.*

Interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the United States District Court for the District of Connecticut, Blumenfeld, J., denying a motion to dismiss an action for possession of land on the ground that the land involved was within the coverage of the Nonintercourse Statute, 25 U.S.C. § 177, and its predecessors.

Affirmed.

FRANCIS J. MACGREGOR, Assistant Attorney General, Hartford, Connecticut (Carl R. Ajello, Attorney General, Gerard J. Dowling, Assistant Attorney General, Hartford, Connecticut, of counsel), *for Defendant-Appellant.*

JEROME M. GRINER, ESQ., West Hartford, Connecticut, *for Plaintiff-Appellee.*

RICHARD S. COHEN, Attorney General of the State of Maine (James D. St. Clair, Esq., William F. Lee, Esq., Hale and Dorr, Boston, Massachusetts, of counsel), *Special Counsel to the State of Maine as Amicus Curiae.*

THOMAS N. TUREEN, ESQ., Portland, Maine, Richard B. Collins, Esq., Boulder Colorado, Native American Rights Fund, *counsel for Passamaquoddy Tribe and the Penobscot Nation as Amicus Curiae.*

LUMBARD, Circuit Judge:

This appeal requires us to decide whether the Nonintercourse statute,[1] which, since 1790, has prohibited the sale of Indian land unless conveyed by a treaty approved by the federal government applies to land throughout the United States. The appeal arises out of a suit brought against the State of Connecticut in the District Court for Connecticut by the Mohegan Tribe of Indians to regain possession of some 2,500 acres of land in the Town of Montville, Connecticut. In its defense, the State of Connecticut filed a motion to dismiss the suit on the ground that the Nonintercourse statute was intended to apply only to land in "Indian country" and thus did not protect the land at issue here. Judge Blumenfeld denied the State's motion, holding that the statute was meant to apply to Indian lands throughout the United States. *Mohegan Tribe v. State of Connecticut*, 483 F. Supp. 597 (D.Conn. 1980). At the State's request, Judge Blumenfeld certified the question of the statute's geographic applicability for appeal pursuant to 28 U.S.C. § 1292(b), and we consented to hear it. We find ourselves in substantial agreement with the reasoning of the district court and therefore affirm.

In the past few years numerous suits have been brought by Indian tribes still residing in the eastern parts of the United States.[2] These tribes have asserted claims to large tracts of land in the East, thereby throwing into uncertainty the validity of land titles throughout the area.

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[1]The statute is presently contained in 25 U.S.C. § 177. Its history is more fully traced below.

[2]*See, e.g., Oneida Indian Nation v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972), *rev'd* 414 U.S. 661 (1974), *on remand* 434 F. Supp. 527 (N.D.N.Y. 1977); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.) *cert. denied*, 444 U.S. 866 (1979); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780

These suits have been based upon the claim, after a century and a half of occupation by non-Indians, that the states in the East entered into treaties with and purchased land from Indian tribes after the passage of the Nonintercourse statute, which by its terms apparently forbade such transactions without the participation of the federal government. To date, the Indians have been largely successful in their legal battles regarding their claims to the eastern lands. Defenses based upon state adverse possession laws and state statutes of limitation have been consistently rejected.[3] The only grounds upon which the States have thus far succeeded in defeating Indian claims is in demonstrating that plaintiffs in these suits do not properly represent an existing tribe which can be proved to be the legitimate descendant of the original landholding tribe.[4]

In these suits, defendant states have marshalled historical evidence which suggests that the eastern Indian tribes and their lands were always understood to be under the jurisdiction of the states. While these arguments have been held to be unavailing in a number of other contexts, such as whether the eastern tribes were properly considered "tribes" under the protection of the federal government,[5] and whether they were considered

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(D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D. R.I. 1976); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975); *aff'd*, 528 F.2d 370 (1st Cir. 1975). Some of these suits have resulted in settlements authorized by Congress. This is true of the Rhode Island claims litigated in *Narragansett*, and, quite recently, of the Main claims at issue in *Passamaquoddy*.

[3]*See, e.g., Oneida, supra* note 2, 434 F. Supp. at 541-44; *Schaghticoke, supra*, note 2, 418 F. Supp. at 803-06. In this suit, however, the State has asserted a defense based upon the "federal common law of laches." That issue is not before us on this appeal, and therefore we express no opinion on its validity.

[4]*See, e.g., Mashpee, supra*, note 2.

[5]*Passamaquoddy, supra*, note 2.

"tribes" for purposes of sovereign immunity to suit,[6] until this action, no court has had to address directly the issue of whether the Nonintercourse statute was intended to apply to land held by the eastern tribes. The State's argument is admittedly appealing in that it would explain why both the states and the federal government have ignored so completely what the Indians assert to be the dictates of the Nonintercourse statute, however, it is necessary to trace the history of the Indian statutes and relevant aspects of Indian land tenure in this country.

I. HISTORY OF INDIAN LEGISLATION

In the Royal Proclamation of 1763, the British Crown declared that the power to "grant Warrants of Survey, or pass Patents" for land in the American territory resided solely in the Crown and not in the Governors or Commanders in Chief of the Colonies. The lands were "reserved to the . . . Indians" unless the sovereign was to decide otherwise. 1 Laws U.S. 443-48.[7] Moreover, the Proclamation, for apparently the first time, established a boundary line between the Indian territory or "Indian country" and the lands of the colonists. Trade which occurred beyond the line could only be conducted with the consent of the Crown. At the same time, land grants throughout the American territories were solely within the authority of the sovereign: grants "upon any Lands whatever, which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians, or any of them." *Id.* Thus, the policy of the Royal Proclamation was to demarcate an "Indian country" within which trading could only be conducted with the approval of the Crown, and to establish that all grants of land from the Indians would be valid only with the approval of the sovereign.

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[6]*Bottonly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979).

[7]The Proclamation is reprinted in H. Commager, Documents of American History 47-50 (8th ed. 1968).

During the Revolution and prior to the Articles of Confederation, the Continental Congress created a Department of Indian Affairs in 1775. The jurisdiction of the Department was divided into three areas, again all lying along the border of so-called "Indian country." 1 Laws U.S. 597. It was not until after the adoption of the Articles of Confederation in 1781, however, that the policy of the colonies toward Indian trade and, in particular, toward alienation of Indian lands was codified. First it is essential to note that Article IX of the Articles of Confederation gave the central government exclusive power over Indian affairs with the limitation that such power could not be exercised in such a manner as to infringe upon the "legislative right" of any state. Thus, in the Resolve of 1783, 1 Laws U.S. 607-08, Congress affirmed the prior policy of the Royal Proclamation of 1763 by establishing that all land transactions with the Indians would be invalid unless approved by the federal government, but it limited the effect of the Resolve to lands outside the borders of the states.

Federal policy during the Confederation thus continued the requirement that dealings with the Indians respecting land sales would only be valid of accomplished with the authority and approval of the central government. However, due to the division of authority between the states and the central government as established in the Articles of Confederation, land transactions within the individual states were left to the authority of the states. On this point the Resolve of 1783 specifically referred to the division of powers established in the Articles of

Confederation. *See id.*

The limitations of federal authority to deal with Indian affairs contained in Article IX of the Articles of Confederation were removed in the Constitution. Instead, the Constitution granted Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Thus, Congress

was granted plenary authority to regulate trade with the Indian tribes throughout the United States.[8]

In 1790, Congress enacted the first of the Indian Trade and Intercourse Acts. Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 Act"). The majority of sections of the Act established a system of licensing for trade with the Indians and imposed federal authority over crimes committed on Indian property. Section 4 of the Act contained the first Nonintercourse statute:

> *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person, or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

The statute thus continued the policy of placing authority to extinguish Indian land rights in the sovereign.

In order to appreciate the meaning of the first Nonintercourse statute, the peculiar nature of Indian land tenure in the United States must be noted.[9] In accordance with the "right of discovery" of the European settlers, native Indians found in this country were granted the "right of occupancy" to their lands. That is, the natives were allowed to remain upon their lands, but their freedom to alienate those lands was restricted. The land could be sold only to the European settlers or the

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[8]This authority was recognized in a series of court decisions culminating in Chief Justice Marshall's definitive statement on the scope of federal power in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[9]This history is best described in the early opinion, by Chief Justice Marshall, in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and in the more recent opinion by Justice White in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

governmental authority representing those settlers. This would prevent, for example, Indians from selling their lands to another foreign government, hostile to the settlers. Thus, while the Indians retained the "right of occupancy," the settlers retained the "fee interest" in the land and retained a "pre-emptive right" to purchase the land from the Indians. After the Revolution, this "pre-emptive right" lay in the individual states — at least in the already settled part of the country. And when the states joined the Union, unless they ceded the lands, they retained their "pre-emptive rights." Nevertheless, the right to purchase Indian lands was not inconsistent with federal control over the extinguishment of Indian occupancy. Thus, the first Nonintercourse statute provided that even where the states retained "pre-emptive rights" to purchase the land, the federal government was responsible for overseeing any transfer of land from the Indians to the states.

The provisions of the Indian Trade and Intercourse Act of 1790 were amended and reenacted five times.[10] In 1793, Congress supplanted the Act of 1790, and continued the regulation of trade with the Indian tribes, providing in more detail for the licensing of such trade and for the enforcement of criminal law on Indian property. More important for our purposes, section 8 of the 1793 Act continued the Nonintercourse statute with minor changes:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe or Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty

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[10]Act of March 1, 1973, ch. 19, 1 Stat. 329 ("the 1793 Act"); Act of May 19, 1796 ch. 30, 1 Stat. 469 ("the 1796 Act"); Act of March 3, 1799, ch. 46, 1 Stat. 743 ("the 1799 Act"); Act of March 30, 1802, ch. 13, 2 Stat. 139 ("the 1802 Act"); Act of June 30, 1834, ch. 161, 4 Stat. 729 ("the 1834 Act").

> of convention entered into pursuant to the constitution . . . *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

When reenacted in 1796, the Act, for the first time, contained in its first section the description of a boundary line "established by treaty between the United States and various Indian tribes," extending from Lake Erie down the Cayahoga and Ohio Rivers, through Kentucky and eventually to South Carolina, delineating settled territory from "Indian country." The first section also contained a proviso that:

> if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

1796 Act, § 1. Again a licensing system was imposed for trade beyond the boundary, and crossing the boundary for certain purposes was prohibited. The Nonintercourse statute, with essentially the same language as in the 1793 Act, became section 12 of the 1796 Act. The Trade and Intercourse Act, as a whole, was reenacted with similar language in 1799 and 1802.

In 1834, however, certain changes relevant to the questions before us were enacted. First, the description of the boundary line between the United States and Indian country along with the proviso regarding changes in the line was eliminated and replaced with the description of Indian country as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished." Thus, Indian country did not include any lands within the borders of these states. At the same time, the Act eliminated the phrase "within the bounds of the United States" in the Nonintercourse statute, so that no words of geographical application existed. The trade restrictions, contained in the other sections of the Act, were expressly limited to Indian country. However, section 29 of the 1834 Act stated that the repeal of the former sections of the earlier Acts would not "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi.

The present Nonintercourse statute, 25 U.S.C. § 177, states simply that:

> No purchase, grant, lease, or other conveyance or lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law of equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

One other section of the Act, important to the question of the Nonintercourse statute's applicability to Eastern lands, shall be mentioned. Beginning in the 1793 Act, all of the Acts contained a section which provided that:

> nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

1793 Act, § 13. This "surrounded by settlements" exception was contained in all of the Acts except that of 1834 when it was eliminated. No comparable provision exists today.

The State of Connecticut makes two arguments based upon the Acts. First, the State argues that the Nonintercourse statute was never meant to apply to land outside of Indian country but was designed only to assure that land on the Western frontier of the country would be obtained from the Indians solely through federal treaties. Indeed, the State asserts that all of the provisions of the various Acts were meant to apply only in Indian country. Second, in the alternative, the State argues that the "surrounded by settlements" provisions were meant to exclude from the operation of the Nonintercourse statute and the Act as a whole, Indian lands in the already developed states. We now turn to these contentions.

II. STATUTORY LANGUAGE

As the district court noted, the proper place to begin in construing a statute is with the language of the statute itself. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). At first blush, it is apparent that the language of the Nonintercourse statute makes its dictates applicable to Indian land located anywhere in the United States. Section 4 of the Act of 1790, the original Nonintercourse staute, quoted above, contains no language suggesting any geographical limitation. In addition, section 4 expressly applies to "any State, whether having the right of pre-emption to such lands or not." This language makes plain that the statute was intended to proscribe land conveyances to the states, and therefore was not limited to protec-

tion of land outside the boundaries of any state. As noted earlier, only the original thirteen colonies had rights of pre-emption to Indian lands, yet the existence of this right of pre-emption did not exclude the existence of federal authority to determine the conditions under which Indian title to land within those states would be extinguished.

The 1793, 1796, 1799, and 1802 Nonintercourse statutes contain the language that no purchase of Indian lands "within the bounds of the United States" will be valid unless accomplished by a federal treaty. This is especially significant considering that, in these Acts, a detailed boundary was drawn which divided settled areas from Indian country. While this language was eliminated from the 1834 Act (along with the detailed description of the Indian boundary), section 29 of the Act specified that the provisions of the 1802 Act, which contained the "within the bounds" language, were still in force with respect to tribes east of the Mississippi. In any event, the 1834 Act and the present statute also contain no language limiting the applicability of the land transfer provisions.

The State of Connecticut contends, however, that the language in the original Nonintercourse statute referring to sales to States with rights of pre-emption and language in subsequent statutes referring to sales to authorized state agents was meant solely to include within federal control land purchases by those of the original states through which the Indian boundary passed, so that those lands within Indian country yet also within the bounds of the original states would be covered. Further, the State argues that the "within the bounds of the United States" language was merely meant to exclude land transactions with Tribes residing outside of the United States who claimed land within the United States. The second contention is simply historically inaccurate, since the United States in fact entered into treaties with tribes under the jurisdiction of foreign countries respecting land within United States borders, and these treaties complied with the requirements of the federal

statutory restraints against alienation. *See e.g.*, Treaty of May 31, 1796, with the Seven Nations of Canada, 7 Stat. 55, which conformed to the requirements of section 12 of the 1796 Trade and Intercourse Act. *See generally*, R. Clinton & M. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 *Main L. Rev.* 17, 30 n. 71 (1979).

The contention that the statute as well as all the provisions of the various Acts was meant to apply only to those parts of the original states which were considered to be within Indian country, while plausible, is amply refuted by inspection of the language of other sections of the various Acts and the structure of the Acts as a whole.[11] To begin with, it is plain from the other sections of the various Acts that Congress was quite explicit when it needed to refer either to Indian country or to the Indian boundary. For example, section 3 of the 1790 Act refers to criminal penalties against those who "attempt to trade with the Indians tribes, or shall be found in the Indian country." The 1793 Act contains the same language in its section 3. Section 6 of the 1793 Act refers to purchases of "any horse [from] an Indian, or [from] any white man in the Indian territory." In the 1796 Act, where Congress was dealing with lands lying west of the described border of Indian country, it did so specifically: section 2, for example, refers to penalties against citizens who cross over, or go within the "said boundary line." And section 14 refers to Indians who cross the "said boundary line." Section 16 of the Act of 1799 refers to persons "found in the Indian country over andbeyond the said boundary line." The 1834 Act states specifically in section 2 that trade with the Indians "in

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[11]The district court rejected the State's argument as being inconsistent with the 1834 Act's description of Indian country as existing solely outside the jurisdiction of the states. We note, however, that section 29 of the 1834 Act retained the provisions of the 1802 Act as they applied to tribes east of the Mississippi. We therefore rely upon other evidence found in the various Acts.

the Indian country" is prohibited unless a license is first obtained from the government. The term "Indian country" also appears in sections 3, 4, 6, 7, 10, 16, 17, 20, 23, 24, and 25 of the 1834 Act. Yet as noted earlier, the Nonintercourse statute contained in the 1834 Act makes no mention of any geographic limitation.

Aside from the plain language of the Nonintercourse statute and the fact that the term "Indian country" does appear in other sections of the Act, other elements of the structure of the Act also rebut the State's argument. First, as noted by the district court, the "surrounded by settlements" exception would make no sense if the Acts as a whole were meant to apply only to Indian country,[12] since no territory within Indian country could have been so surrounded. Second, as also noted by the district court, the provision respecting the President's power to take measures to prevent the sale of alcohol to the Indian tribes, originally adopted in the 1802 Act without any language of geographical limitation, was amended in 1822 to state that the President would be given the power in particular to authorize searches of the wares of traders upon information that "ardent spirits" were being "carried into the Indian countries by said traders." Act of May 6, 1822, ch. 581, 3 Stat. 682. When incorporated into the 1834 Act, the provisions relating to alcohol were specifically limited to "Indian country." 1834 Act, § 20. These changes would have been unnecessary had the 1802 Act applied only in Indian country.

Third, it is particularly striking that despite the large number of references to Indian country and Indian territory contained in the Acts, mentioned above, a number of other provisions including the Nonintercourse statutes contain no language of geographic limitations. These provisions contain

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[12]The State's argument, in the alternative that this exception applies to eastern land transactions is discussed below.

restrictions respecting trade simply with "any Indian tribe" or respecting "lands belonging to any Indian tribe." For example, section 5 of the 1793 Act imposes penalties for making a settlement upon "lands belonging to any Indian tribe." Similarly, section 9 of the 1793 Act provides for furnishing services to "the friendly Indian tribes" without geographic limitation. Yet Section 6 of the 1793 Act specifically prohibits horse trading without a license "in the Indian territory." Thus examination of the provisions of the 1793 Act suggests that Congress was careful to distinguish between regulations applicable only to Indian country and those applicable to all Indian tribes and their lands. Further examples could be drawn from the subsequent Acts. We conclude that, by failing to use language restricting applicability of the Nonintercourse statute, Congress intended the statute to apply throughout the United States.

Indeed, as noted by the district court, the only arguments with respect to the language of the Acts that the State can muster in support of its view that the Nonintercourse staute applied solely in Indian country are rather tenuous. The State first points to the titles of the various Acts. For example, the 1796 Act is entitled, "An Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers." From this, the State argues that the statute was concerned only with land transactions on the frontiers. Apart from the purposes of the Acts, which we will discuss below, it is sufficient to note here that the "Peace on the Frontiers" language was not contained in the titles of the 1790 or 1793 Acts, and that, although useful in interpretation of ambiguous provisions, the title of an Act cannot be held to contradict the more specific language contained in the body of the Act.

The only other argument based upon statutory language concerns the provisos contained in the 1796, 1799 and 1802 Acts' description of the Indian boundary. These provisos stated that if the boundary is subsequently altered by treaties

with the Indians, "*all the provisions* contained in [the Acts] shall be construed so as to apply to the said line so to be varied in the same manner, as said provisions apply, by force of [these Acts] to the boundary line hereinbefore." (Emphasis added.) The State emphasizes the first few words of the proviso, but when read as a whole it is quite plain that the proviso applied if subsequent treaties should alter the boundary and provided that those sections which did apply to the boundary would similarly apply to any new boundary established by those treaties. Hence, those sections that did not apply to the boundary would be left unaffected.

Thus, the conclusion to be drawn from the language of the Nonintercourse statute and the various Acts is that the statute was meant to apply to Indian land throughout the United States. In regulating relations with the Indians, Congress imposed certain restrictions on transactions occurring in Indian country and certain others to those involving Indians situated throughout the United States. The Nonintercourse statute, containing no language of limitation, must then be read as applying to all Indian lands.

III. LEGISLATIVE AND JURISDICTIONAL HISTORY

Connecticut, however, makes a number of arguments for its interpretation of the statute based upon external evidence: first, the State argues that the purposes of the Trade and Intercourse Acts were both to preserve peace on the frontier and to enforce treaty obligations and that neither of these purposes would require protection of lands outside of Indian country. Moreover, it finds support for these views in the history of English and colonial legislation regarding Indian lands as well as federal Indian policies during the Confederation. Finally, the State points to evidence of executive branch interpretation of the Acts also indicating that the Acts were understood to leave land transactions with eastern Indian tribes to the control of the states. We are not persuaded.

As the Supreme Court has noted with respect to Indian legislation and treaties, "[t]hese instruments . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 206 (1978); *accord, Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979). Certainly, courts should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are as deeply embedded in American history as are those relevant here.

Legislative history is practically nonexistent on the particular issue of geographic applicability. There is only a single sentence in the House Report on the 1834 Act which suggests that that Act was meant only to apply outside the jurisdiction of any of the states.[13] However, as the district court recognized, the effect of this isolated statement is undercut by the subsequent amendment to the Act which added section 29 — the section which continued in effect provisions of the 1802 Act insofar as they applied to Indians east of the Mississippi.

Apart from this, the State's argument as to Legislative intent is not so much directly on the point of geographic applicability as it is on the motivation for granting federal protection to the Indians. The evidence suggests that federal Indian policy was based upon the need to prevent Indian uprisings. Accordingly, certain concessions were granted to the Indian tribes in order to avoid the necessity for large-scale military intervention.

Thus, the State directs our attention to statements by President Washington, and his Secretary of War, Henry Knox,

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[13] "This bill is intended to apply to the whole Indian country . . .; it will continue to embrace only those sections of the country not within any State . . . ." H.R. Rep. No. 474 23d Cong., 1st Sess. 10 (1834).

both of whom played a large part in developing the original Trade and Intercourse Act, regarding the necessity of restraining settlers from encroaching upon Indian lands on the frontier, since these encroachments were a constant source of Indian unrest.[14] The State also points to the writings of several historians respecting Washington's and Knox's desire to satisfy the concerns of the Indians over the activities of settlers along the frontier.[15] While the evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them, and although this evidence quite readily demonstrates that contemporary attitudes have colored our views of the original motives behind American Indian policy, we do not believe that the evidence in any way rebuts the Nonintercourse statute's applicability to Indian lands throughout the United States. Of course, Washington and Knox and their countrymen were concerned not only with protecting the Indians, but with preventing the onset of overt hostilities. Moreover, it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions. Nevertheless, there is nothing inconsistent with these views in reading the Nonintercourse statute, as its language suggests, to include encroachment upon Indian lands throughout the United States. Such a promise may well have been thought best to mollify the apprehensions of Indians on the frontier as well as those in the settled regions. Surely it would have furnished evidence to the Indians of the seriousness of the federal gov-

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[14]*See, e.g.*, various statements by President Washington printed in 1 J. Richardson, Messages and Papers of the Presidents 59-60, 61, 67-68, 71, 104; and Knox's report to Congress printed in 2 American State Papers — Indian Affairs 53.

[15]*See, e.g.*, F. Prucha, American Indian Policy in the formative years: The Indian Trade and Intercourse Act. 1790-1834 43-45, 48 (1962); S. Tyler, A History of Indian Policy 39 (1973); R. Horseman, Expansion and American Indian Policy 69-70 (1967).

ernment's intention to regulate land sales, a matter of great concern to the Indians.

The State also points to considerable evidence that the Acts were designed to enforce various obligations imposed by treaties with the Indians entered into by the federal government, and therefore the Acts were not concerned with the eastern tribes with whom no treaties were held. One of the most prominent commentators on Indian Law, Felix Cohen, has written that "each of the substantive provisions of the first Indian Trade and Intercourse Act fulfilled some obligation assumed by the United States in treaties with various Indian tribes," and that this analysis "would probably apply equally to each of the later trade and intercourse acts." F. Cohen, *Handbook of Federal Indian Law* 69-70 (1945). However, this does not support the view that the framers of Indian legislation did not also wish to protect Indian tribes located throughout the United States. Indeed, it may well have been to placate tribes located on the frontier or with whom the United States had entered into treaties that federal protection was granted to all Indian lands.

We thus agree with the district court that there is no evidence demonstrating that peace on the frontier and enforcement of treaty obligations were the *sole* purposes of the various Acts. We share the district court's intuition that if the states were meant to retain control over eastern Indian lands, some evidence of such authority would exist. Finally, as just noted, it would seem consistent with the goals of the early administrations to convince the Indians both on the frontier and elsewhere that the federal government meant to take into its own hands the problems of intrusions upon Indian property wherever they might occur.

As for the evidence regarding Indian policy preceding the various Trade and Intercourse Acts, we believe that examination of this history, outlined above, rebuts rather than supports

the State's position. As noted earlier, from the time of the Royal Proclamation of 1763, it was the policy of the sovereign to retain control over land transactions with the Indians in the central government, first the British Crown and later the federal government. The only period during which this was not the case was during the Confederation. During that period, as outlined above in discussing the Resolve of 1783, federal Indian policy was constrained by the limits imposed by Article IX of the Articles of Confederation. It was dissatisfaction with these limitations that led to the expansive definition of federal power to deal with the Indians under the Commerce Clause of the new Constitution. The State's argument that the new Congress declined to exercise its expanded powers and chose instead to maintain Indian policies established during the Confederation is highly implausible. Aside from lacking any support in the language of the enactments subsequent to the Constitution, or in any decisions of the courts, it is also rebutted by the history recited above suggesting that under its expanded powers Congress reverted to the policy established long before the Confederation that the sovereign would control all transactions with the Indians.

Lastly, the State asserts that evidence of the interpretation of the Acts by the executive branch supports its position. Admittedly, "[l]ongstanding, contemporaneous executive and administrative interpretation by those entrusted with the enforcement of ambiguous legislation may also shed light upon an appropriate construction" of statutory language. *Leary v. United States*, 395 U.S. 6, 25 (1969). The State points out that President Washington himself wrote in 1792 that the New England tribes were "so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protections." Letter to Archbishop John Carroll, quoted in P. Guilsday, *The Life and Time of John Carroll* 607 (1954). In more recent times, the federal government repeatedly disclaimed any responsibility for managing the affairs

of the eastern tribes. *See* Letter, W. A. Jones, Acting Commissioner of Indian Affairs to Francis M. Morrison, Esq., July 10, 1899; Letter, Commissioner of Indian Affairs C. J. Rhoades to Mrs. Edith M. Smith, October 12, 1931.

Nevertheless, the fact that the federal government disclaimed responsibility for these tribes is not determinative here. We believe that, although considerable evidence amassed by the State supports the proposition that the federal government did not avail itself of the provisions of the Nonintercourse statute and appeared to leave management of the affairs of the eastern tribes to the individual states, it does not follow that the federal government had no obligation to do so, or that the states had the authority — unimpeded by the Acts — to buy land from the eastern tribes without federal approval. We note, moreover, that there is no mention of any reliance by the federal government upon any geographical limitations contained in federal Indian legislation in the evidence offered. We also note that none of the evidence concerns land transactions.

IV. CASE LAW

The State, finally, relies upon statements in the case law which are said to determine the question of geographic applicability of the various Nonintercourse statutes and the Trade and Intercourse Acts as a whole. In our view, however, the case law is inconclusive on the issue.

The State points first to early decisions containing language suggesting that the Trade and Intercourse Acts were meant to be confined to Indian country. In *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 357, 369 (1829), for example, the Supreme Court stated that "all the provisions contained in [the 1802] Act, and consequently, those contained in the amendatory act of 1822, are by [the first section] expressly confined" to

"Indian country." The Court, in *American Fur*, however, was concerned with the question of penalties for those found bringing "ardent liquors" into Indian country for trade with the Indians, and it held that only those goods of the traders found within Indian country were to be forfeited. The Court was construing only that section of the Act, added by amendment in 1822, respecting importation of liquor into Indian country and the penalties for doing so. Similarly, in *Bates v. Clark*, 95 U.S. 204, 205 (1877), the issue was whether goods seized by American military officers after finding that the owner intended to import liquor into Indian country for trade purposes, were properly seized inside of Indian country. While the Court used broad language respecting the applicability of the Act, it was only interpreting provisions relating to penalties for importation of alcohol, by that time contained in section 20 of the 1834 Act, and further amended by statute in 1864. While admittedly, the statements made in both *American Fur* and *Bates* suggested that all the provisions of the Acts, including the Nonintercourse statute, were limited to operation to Indian country, the Court in those cases was concerned with particular provisions of the Acts and suggested only that the trade and intercourse provisions were generally limited to Indian country.

The State also points to language, generally dicta, in various decisions recognizing state control over the eastern tribes. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832) (McLean, J., concurring). It should be noted, however, that these comments were made in the context of constitutional decisions respecting the reach of federal control over the Indian tribes. On these issues, Justice McLean's views, while shared by certain state courts, *see, e.g., State v. Doxtater*, 47 Wis. 278, 2 N.W. 439 (1879), never commanded a majority of the Supreme Court. Instead, the majority view was that stated by Chief Justice Marshall in the *Worcester* opinion, noting that federal authority over Indian affairs was plenary, and that the grant to regulate "Commerce" among the Indian tribes gave

the federal government authority to regulate practically all aspects of Indian affairs.[16]

Third, the State cites a number of early decisions respecting Indian land tenure. *See, e.g., Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 31 (1831) (Baldwin, *J.*, concurring); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Most of these cases are concerned with various conveyances by the states of lands formerly held by the Indians. None of them suggests limitations on the applicability of the Nonintercourse statute.

Most of the decisions cited involved transfer of a state's "fee" interest subject to the right of Indian occupation. *Fletcher v. Peck, supra; Johnson v. M'Intosh, supra*. In *New Jersey v. Wilson, supra*, the Indians had abandoned the land in question and the only issue was whether the land was still non-taxable. Justice Baldwin's comments in *Cherokee Nation, supra*, also refer to the fact that, although the states were "seized in fee," the states' interests were subject to the Indian rights of occupation. Finally, in *Mitchel, supra*, the Court was analogizing to certain decisions holding that state land grants would be held valid as to land within the States, but invalid as to lands in Indian country. In the cited decisions, however, *Winn v. Patterson*, 34 U.S. (9 Pet.) 663 (1835); *Danforth v. Wear*, 22 22 U.S. (9 Wheat.) 673 (1824); *Patterson v. Jenks*, 27 U.S. (2 Pet.) 216 (1829), not only did all of the state land grants predate the Indian Trade and Intercourse Act of 1790, but one of the decisions, *Danforth v. Wear, supra*, made clear that even as to those transactions the state's interest could only be conveyed subject to the extinguishment of Indian title. Thus, the early

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[16]The story of Justice McLean's dispute with Chief Justice Marshall, and the ultimate victory of the latter's views, may be found in M. Price, Law and the American Indian 40-68 (1973).

decisions of the Supreme Court do not support the State's position that the Nonintercourse statute applied solely in Indian country.

We turn then to the two most recent opinions bearing upon this subject, each of which contains language providing some support for the positions urged by the two parties in this appeal. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Court held that there was federal jurisdiction to hear a claim for ejectment based upon Indian title, since that title rested upon federal law. In the course of its opinion, the Court noted that:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

414 U.S. at 670 (footnote omitted).

Most recently, in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), the Court held that the present-day descendant of section 22 of the 1834 Act, which establishes the burden of proof in land disputes between Indians and "a white person," did not apply to a suit between the State of Iowa and an Indian tribe. As one of the reasons in support of its conclusion, the Court noted that the original section 22 was incorporated into the 1834 Act which, according to the Court, was meant to apply only "to the

whole Indian country." 442 U.S. at 667, quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834). Thus, the *Wilson* court believed that in adopting section 22, the Congress had in mind only land disputes arising outside the jurisdiction of any state.

Although the district court found *Oneida's* language more closely on point than *Wilson's*, we believe that neither is determinative here. Regardless of whether the quoted language from *Oneida* is dictum or not, it suggests only that all Indian land transfers were subject to federal control and that extinguishment of Indian title is a federal question. It does not necessarily hold that the specific provisions of the Nonintercourse statute applied to all of those transfers. Instead, it would be consistent with *Oneida* to hold, as the State argues, that land transfers in Indian country were to be governed by the statute, but that the exclusion of eastern lands from the Nonintercourse statute meant that the "federal law" as to those lands was to allow the states to purchase them.

At the same time, *Wilson* does not persuade us to find that the Nonintercourse statute was so limited. *Wilson* involved the construction of a provision enacted independently of other Indian legislation and added to the Trade and Intercourse Act in 1834. Once again, it must be recalled that section 29 of the 1834 Act provided that the 1802 Act would remain in effect with respect to tribes located east of the Mississippi. Thus, while section 22, relating to the burden of proof in land disputes, may have been meant to apply only within the Indian territory specified in section 1 of the 1834 Act, there is no reason to conclude that the Nonintercourse statute, contained in both the 1802 and 1834 Acts, was also so limited. Nothing in *Wilson* reflects at all upon the geographic applicability of the previous Trade and Nonintercourse Acts, and therefore, even if it were to be held that the 1834 Nonintercourse statute was limited territorially, the Nonintercourse statute contained in the 1802

Act remained applicable by virtue of section 29 of the 1834 Act to the tribes east of the Mississippi.[17]

We conclude that the case law does not support the State's contention that we should ignore the plain language of the statute and limit the Nonintercourse statute's applicability. Moreover, while no case is controlling on the issue, *Oneida* does make clear that the extinguishment of all Indian title was meant to be a matter of federal concern. Since we have found no evidence that Congress intended to treat eastern Indian lands in a different manner, it would seem reasonable to believe that Congress intended a unified federal policy toward land acquisition from the Indians. In any event, we find nothing in the case law which dissuades us from or conclusion that Congress intended the Nonintercourse statute to apply throughout the United States.

V. "SURROUNDED BY SETTLEMENTS" EXCEPTION

As we conclude that the Nonintercourse statute was intended to apply to lands throughout the United States, we must consider the State's contention that the "surrounded by settlements" exception was intended to exempt from the various provisions of the Trade and Intercourse Acts transactions, including those involving land, with Indians residing in the settled areas of the eastern States. The district court disposed of this issue by adopting the view put forth in *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 808-09 (D.R.I. 1976). 483 F. Supp. at 599, n.9. In *Narragansett*, the district court held that the "surrounded by

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[17]We are aware that, after the *Wilson* decision was announced, the Solicitor General filed a motion for modification of the *Wilson* opinion, fearing that, by the language in *Wilson*, the Supreme Court had inadvertently foreclosed the various Indian eastern land claims. This motion was denied. Nevertheless, we do not believe this was a decision on the merits of the claims. The Court may have thought, as we do, that its opinion did not foreclose those claims.

settlements" exception applied only to trade with *individual* Indians who had left their tribes and chose to reside in non-Indian settlements. This interpretation was also accepted by the district court in *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd on other grounds sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.) *cert. denied*, 444 U.S. 866 (1979).

We find this issue more troublesome than did the district court. It accepted the reasoning of *Narragansett* that the exception applied only to individual Indian land transactions because the exception was eliminated in the 1834 Act at the same time that the Nonintercourse statute was amended to exclude coverage of land transactions with individual Indians. 418 F. Supp. at 808-09. There are difficulties with this reading of the exception. The most serious one would seem to be that there is no necessary connection between the elimination of the exception, which did not contain any language suggesting that it was an exception solely to the Nonintercourse statute itself. Indeed, the exception provided for "trade and intercourse" with Indians surrounded by non-Indian settlements, and thus, it must have applied to the trade and intercourse provisions as well. Yet examination of the 1834 Act reveals that the Act continued to proscribe certain types of transactions even with individual Indians or upon property owned by individual Indians. *See, e.g.*, § 7 ("purchase or receive of any Indian"); § 9 ("on any land belonging to any Indian or Indian tribe"); § 20 ("sell . . . any spiritous liquor or wine to an Indian").

Further doubts about the *Narragansett* court's approach are rasied by considering the origin of the "surrounded by settlements" exception. The exception derived from a proviso in section 1 of the original 1790 Act. That proviso stated that "the President may make such order respecting the tribes surrounded in their settlements by the citizen of the United States, as to secure an intercourse without license, if he may deem it proper." While in subsequent Acts, the exception

stated merely that it applied to transactions "with Indians," it does not appear that Indian *tribes* surrounded by settlements were meant to be excluded. Indeed, the term "Indians" standing alone in the Acts has generally been interpreted to include both individual Indians as well as Indian tribes. *Wilson, supra*, 442 U.S. at 665-66.[18] It thus appears that the exception was meant to apply to transactions both with individual Indians and with tribes whenever either was situated on lands surrounded by non-Indian settlements.

While these considerations suggest that the district court was incorrect in its reading of the exception, they do not compel acceptance of the State's position that the exception was intended to exclude land transactions by eastern tribes. Instead, we find most persuasive the position advanced here by the Mohegan Tribe: that the "surrounded by settlements" exception was not meant to apply to land transactions at all. As just noted, the exception first appeared as a proviso in the first section of the 1790 Act. That section required that all "trade and intercourse" with Indian tribes be undertaken only by those possessing licenses from the federal government. The land provisions, which applied at the time to both individual and tribal lands, were contained in a separate section. In subsequent Acts, the only change was to place the exception in a separate section. Thus, it would appear that no substantive changes were intended by this alteration beside the important one of withdrawing the matter from Presidential discretion and making it mandatory. Moreover, the change from "tribes" in

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[18]Moreover, in other sections of the Acts the term "Indians" is used when Congress clearly intended to refer to Indian tribes. For example, in certain of the Nonintercourse statutes themselves a proviso states that "it should be unlawful for the agent or agents of any state, who may be present at any treaty held with *Indians*, under the authority of the United States . . . to adjust with the Indians, the compensation to be made, for their claims to lands with such state . . . ." (Emphasis supplied.) Treaties were made only with Indian tribes, not with individual Indians.

the 1790 Act to "Indians" in subsequent Acts is explained simply by the fact that section 1 of the 1790 Act itself applied only to trading with "the Indian tribes," while the subsequent Acts also restricted certain types of trade with individual Indians. *See, e.g.*, § 6 of the 1793 Act and §§ 9-10 of the 1796 Act.

The land provisions of the Acts, however, always remained distinct from those regulating "trade and intercourse." Thus, it appears that the "surrounded by settlements" exception was meant to apply only to the latter. The elimination of the exception in the 1834 Act is more plausibly explained by the fact that the 1834 Act specifically limited its trade restrictions to Indian country, *see e.g.*, §§ 2, 6, 7, although once again, it must be recalled that section 29 of the 1834 Act continued in effect those provisions of the 1802 Act applicable to tribes east of the Mississippi. Thus, the exception would seem to have remained applicable to trade and intercourse with certain of the eastern tribes, but not to any land transactions with the states. That the 1834 Act eliminated land transactions with individual Indians from the coverage of the Act is of no significance.

We agree with the district court that the Nonintercourse statute was not intended to be applicable solely in Indian country. We also hold that the "surrounded by settlements" exception was not meant to apply to Indian land transactions. The order denying defendant's motion to dismiss is affirmed.

APPENDIX B

DISTRICT OF CONNECTICUT

MOHEGAN TRIBE	:	
v.	:	CIVIL NO. H-77-434
STATE OF CONNECTICUT	:	

RULING ON MOTION TO DISMISS

This is a civil action for possession of land now allegedly owned and used by the State of Connecticut. The plaintiff, the Mohegan Tribe of Indians, claims that certain lands located in the northeast portion of the Town of Montville, Connecticut were "from time immemorial . . . until [the] defendant's predecessor-in-title . . . purported to claim title to the [land], exclusively owned, used, and occupied" by the Mohegans. It further claims that the property was held by the Tribe at the time of the enactment of the first Indian Trade and Intercourse Act in 1790. Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 Act"). That act and its successors provided, in part, that conveyances of Indian land to non-Indians would be invalid unless made by treaty under the authority of the United States.[1] Since the Indians held the land at the time of the Act and since no federal treaty has ever been made with them, they claim that the land is rightfully theirs.

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[1]In this opinion, the court refers to the Indian land transfer provision, currently codified at 25 U.S.C. § 177, as the "Nonintercourse" statute. The Nonintercourse statute was always enacted along with other Indian statutes, the whole body of which will be referred to herein as the "Trade and Intercourse Act" or more simply as the "Act." While the Nonintercourse statute prohibited certain land transactions with Indians, the remaining provisions of the Trade and Intercourse Act swept more broadly. At different times the Act has regulated trade in such diverse products as whiskey, guns, horses, and pots and pans, as well as jurisdiction for criminal prosecutions. It is currently codified in Titles 25 and 26 of the United States Code.

Connecticut has filed a motion to dismiss this action. It bases its motion on a claim that the Trade and Intercourse Acts were not intended to apply to Indian tribes which were located to the east of the "Indian country" borderline. That borderline was defined for the first time in the 1834 enactment of the Trade and Intercourse Act,[2] *but it is conceded that at no time between 1790 and the present have the Mohegans been residents of "Indian country." If, as the State contends, the Nonintercourse statute applied only in Indian country, the case should be dismissed.*

The current Nonintercourse statute, 25 U.S.C. § 177, and its predecessors, are all put in issue by the plaintiff's complaint and the defendant's answer. Since each reenactment of the Nonintercourse statute was primarily based on the language of the prior statute, however, the proper starting point for any inquiry lies in the original 1790 Act. It provided in pertinent part that:

> "no sale of lands made by any Indians, or any nation or tribe of Indians, *within the United States*, shall be valid to any person or persons, or *to any state*, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

1790 Act, § 4 (emphasis added). The Act of March 1, 1793, ch. 19, 1 Stat. 29 ("1793 Act"), which supplanted the 1790 Act, provided:

> "That no purchase or grant of lands, or of any title or claim thereto, from any Indians, or nation or tribe of Indians, *within the bounds of the United States*, shall

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[2] Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729.

> be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution: . . . [I]t shall be lawful for the agent or agents of any State . . . under the authority of the United States, . . . to propose to, and adjust with the Indians, the compensation for their claims to lands within such States . . . ."

1793 Act, § 8 (emphasis added). Because of a section in the 1793 Act which provided that the entire Act was to expire automatically after approximately two years,[3] the legislature reenacted the same Act in 1796.[4] With essentially the same language, the Act was again reenacted in 1799[5] and 1802.[6]

In 1834, the Nonintercourse statute took on the shape which it has had to present day.[7] With only one relevant exception, the language of the section on land conveyances is identical to the language in the corresponding section of the 1793 Act. The only exception is the ommission of the words "within the bounds of the United States." These words do not appear inthe 1834 Act and since then no geographic limitation whatsoever has replaced them.

In spite of the fact that the Nonintercourse statute was enacted five times with the explicit words "within the United States" and still contains no explicit limitations, the defendant insists that the statute should be read as limited solely to "Indian country." Connecticut bases this claim on the legislative intent and history lying behind the Trade and Intercouse

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[3]1793 Act, § 15.

[4]Act of May 19, 1796, ch. 30, 1 Stat. 469 ("1796 Act").

[5]Act of March 3, 1799, ch. 46, 1 Stat. 743 ("1799 Act").

[6]Act of March 30, 1802, ch. 13, 2 Stat. 139 ("1802 Act").

[7]Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729 ("1834 Act").

Acts and on other sections of the Acts which do contain express geographic limitations.

Resolution of this motion only requires the court to construe the Nonintercouse statute. Arguments over the meaning of this short, three-sentence provision, however, have generated in excess of 300 pages of briefing, extensive research, and elaborate appendices. The arguments advanced by both parties can be grouped into three categories. Some are based on the language of the Acts themselves, some are based on their historical context, and others are based on prior case law. This opinion considers each of these three sets of arguments separately.

The Language of The Act

In a case involving the interpretation of a statute, analysis must begin with the language of the statute itself. *Touche Ross & Co. v. Redington*, 47 U.S.L.W. 4732, 4734 (U.S. June 19, 1979). The language of the Trade and Intercourse Acts does not support the defendant's motion. In addition to the explicit references to "within the bounds of the United States" found in the land conveyance section, the language of several other sections in these Acts suggest that their application is not limited to Indian country.

For instance, from 793 until 1834, every Act contained a "surrounded by settlements" provision.[8] Under this provision, the terms of the Act were not "to be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States and being within the ordinary jurisdiction of any of the individual

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[8]1802 Act, § 19; 1799 Act, § 19; 1796 Act, § 19; 1793 Act, § 13.

States . . . ."[9] At the time, there were no such surrounded Indians in the area defined as Indian country. If, as the defendant contends, the *entire* Trade and Intercourse Act was to apply only to Indian country, it would have served no purpose to *exempt* Indians living *outside* Indian country. It must be assumed that Congress knew what it was doing when it enacted the Act; this court is not inclined to give the Act an interpretation which will render portions of it meaningless. *Reiter v. Sonotone Corp.*, 47 U.S.L.W. 4673, 4674 (U.S. June 11, 1979); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Another rule of statutory construction also lends support to the plaintiff's position. In 1802, Congress added section 21 to the Act, which provided:

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[9]Defendant has also advanced an argument based on these sections. Connecticut claims that by their express terms these sections exclude Indians surrounded by white citizens from the protection of the Trade and Intercourse Acts. Thus, since the Mohegan Tribe had been surrounded by white citizens since well before 1790, Connecticut argues, it never was entitled to the protection of the Nonintercourse statute.

The flaw in this argument, however, stems from reading the word "Indian" in these sections to include Indians living in tribal communities. As one court has recently stated:

> "At the time that this proviso was a part of the Act, the terms of the Act applied in land of 'any Indian' as well as to that of any 'nation or tribe of Indians.' The provision was repealed in 1834, . . . at the same time that transactions by individual Indians were removed completely from the coverage of the Act . . . . Thus the most logical interpretation of the proviso is the one which is also the most consistent with the rules of construction governing statutes relating to Indians . . . : the proviso was addressed to transactions by individual Indians living in 'white' settlements and has no application to land to which a *tribal* right of occupancy is claimed."

Narragansett Tribe v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798, 808-809 (D.R.I. 1976).

> "That the President of the United States be authorized to take such measures, . . . to prevent or restrain the vending or distributing of spirituous liquors *among all or any of the said Indian tribes*, ..."
>
> (Emphasis added).[10]

In 1822, however, Congress deemed it advisable to amend this section so as to limit its applicability to Indian country:

> "That it shall and may be lawful for the President of the United States, in execution of the power ves ed in him by the *twenty-first section* of the act of the thirtieth of March, one thousand eight hundred and two, aforesaid, [the Trade and Intercouse Act] *to which this is an amendment*, to direct . . . [certain persons] to cause the stories and packages of goods of all traders to be searched, upon suspicion or information that *ardent spirits are carried into the Indian countries* by said traders *in violation of the twenty-first section of the act to which this is an amendment* . . . ."
>
> (Emphasis added).[11]

"It is a canon of statutory construction that where, as here, the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." *Klein v. Republic Steel Corporation*, 435 F.2d 762, 765, 766 (3d Cir. 1970). Thus, it seems unlikely that the 1822 amendment would have been necessary had the 1802 Act been entirely limited to Indian country. On the contrary, the logical conclusion to draw from

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[10]1802 Act, § 21.

[11]Act of May 6, 1822, ch. 58, 3 Stat. 682.

this amendment is that when Congress wanted to limit the effect of a particular provision it was quite aware of how to do so.

In addition to these provisions, the specific provision concerning land transfer has a clue to its geographic applicability imbedded within it. Under the terms of every Act enacted after 1790, the "agents of States" were allowed to negotiate with Indians (under federal auspices) for claims to lands "within such States."[12] This makes it clear that the Nonintercourse statute was meant to apply within state boundaries. Defendant apparently concedes as much, but it points out that the boundary to Indian country ran through the western parts of some of the original 13 states. Thus, it claims that this proviso was meant to apply to land which was both in Indian country and within the boundaries of states. While this argument sustains the state's position for some of the earlier Acts, the 1834 Act, which contains the same proviso, expressly indicates that Indian country lies only outside of states.[13] It is therefore logically impossible to conclude both that the Act was meant to apply within the boundaries of a state, a conclusion mandated by the express language of the provision, and that the Act applied only to Indian country, a conclusion drawn by the defendant. This, then, is further strong support for the plaintiff's position.

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[12]1834 Act, § 12; 1802 Act, § 12; 1799 Act, § 12; 1796 Act, § 12, 1793 Act, § 8.

[13]"That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas and, also, that part of the United States east of the Mississippi river, and not within any State to which Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country." 1834 Act, § 1.

In order better to understand the awkward language of this section, it is helpful to insert a comma following the phrase "and not within any State." Such an insertion is in accord with the intended meaning of the section.

In opposition to these arguments, the defendant can muster only paltry support from the language of the Act. For instance, it argues that the title of the Act, "Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers," suggests that the Act was solely designed to govern relations with frontier tribes. But, for whatever significance should be given to the title,[14] it is perhaps more accurate to say that it describes two objectives, only one of which dealt exclusively with frontier tribes. Moreover, the titles to the 1790 and 1793 Acts did not contain the "Peace on the Frontier" language upon which the defendants rely, even though they did include the restrictions on land convenances at issue here.

Defendant also argues that the extensive delineation of a boundary line in the Act must signify that the entire Act was to

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[14] "[H]eading and title are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the test which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *United States v. Fisher*, 2 Cranch 358, 386; *Cornell v. Coyne*, 192 U.S. 418, 430; *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348, 354. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-29 (1947). *See also* United States v. Roemer, 514 F.2d 1377, 1380 (2d Cir. 1975) ("[B]asic principle of statutory construction . . . gives precedence, in the event of irreconcilable conflict, to words in the body of a provision over those in a caption.").

apply only in the demarcated territory. Otherwise Connecticut claims, the existence of a boundary line would be meaningless. The answer to this is obvious. Some sections of the Act expressly proscribed certain activities in "Indian country." For those sections, a definitive boundary line was important. Other sections, not limited to Indian country by their terms, need not be given limited geographical applicability in order to ascribe meaning to the boundary line. It is no more persuasive to say that the mere existence of a boundary line in a statute means that all of the provisions of that statute are applicable only within the boundary, than it is to say that Congress' failure explicitly to limit the provisions of the entire Act to Indian country proves the contrary.

Finally, defendant argues that "boundary line" language found in the 1796-1802 Act suggests that the entire Act was to be limited to Indian country. Defendant emphasizes the following closing proviso:

> "[I]f the boundary line between the said Indian tribes and the United Sttes shall at any time hereafter, be varied, by any treaty . . . then *all the provisions* contained in this act shall be construed so as to apply to the said line so to be varied . . . ."[15]

Defendant would have the court ignore, however, the language obscured in the final ellipsis. The statute continues:

> ". . . in the same manner, as said provisions apply, by force of this act, to the boundary line hereinbefore."

In other words, where the boundary line as described in the Act is applicable to a particular provision, an amended boundary will also apply. If it suggests anything, however, the language

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[15]1802 Act, § 1; 1799 Act, § 1; 1796 Act, § 1 (emphasis added).

tends to suggest that the "manner" in which the boundary line applies to various provisions may not be uniform section-to-section throughout the Act.

In short, the language of the Act — both that of the particular land conveyance section and that of the Act as a whole — does not support the defendant's position. On their face, the Trade and Intercourse Acts and the Nonintercouse statutes clearly apply everywhere "within the bounds of the United States," in Indian country and elsewhere.

Legislative History and Historical Context

Because of the apparent clarity of the statutory language, plaintiff argues that reference to legislative history is inappropriate. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). As the Supreme Court has noted, however, " '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." ' " *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976), *quoting United States v. American Trucking Ass'n.*, 310 U.S. 534, 543-44 (1940) (footnotes omitted). Ultimately, the objective of the court in construing a particular statute is to "ascertain the congressional intent and give effect to the legislative will," *Philbrook v. Glodgett*, 421 U.S.707, 713 (1975), and while legislative intent is best gleaned from the text of the statute itself, *AFL-CIO v. Marshall*, 570 F.2d 1030, 1036 (D.C. Cir. 1978); *Patagonia Corp. v. Board of Governors of Federal Reserve System*, 517 F.2d 803, 813 (9th Cir. 1975), the court should not be loathe to probe beneath the surface in its search for underlying intent.

Consequently, this Court has gone beyond the language of the statute and has carefully examined the historical arguments advanced by the defendant. These arguments have been elaborately presented in meticulous briefs with extensive appen-

dices and center on three general themes.[16] First, the defendant presents evidence which it claims shows that the Nonintercourse statutes were enacted merely as a continuation of the limited Indian act passed under the Articles of Confederation. Second, the defendant argues that the Acts were enacted solely to secure treaty rights and to preserve peace in the frontier; and finally, the defendant points to an extensive compilation of jurisdictional history which suggests that the executive branch of the government, throughout the 19th century, treated the Trade and Intercourse Acts as applicable solely to Indian country.

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[16]In addition to arguments based on a more generalized history of Indian relations, the defendant has unearthed one fragment of "legislative history," as that term is generally used. In a report accompanying three bills, one of which dealt with the enactment of the 1834 Trade and Intercourse Act, the Committee of Indian Affairs of the House of Representatives stated that:

> "This bill is intended to apply to the whole Indian country . . . ; it will continue to embrace only those sections of country not within any State . . . ."

H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834).

While this quote has some probative value, its importance was minimized when, after the report was issued, an amendment offered by Senator Frelinghuysen was adopted on the floor of the Senate. Frelinghuysen, a bitter opponent of President Jackson's policy of removing Indian tribes to the west of the Mississippi, was able to insert a protective proviso in the 1834 Act. The proviso declared that the repeal of the 1802 Act by the 1934 enactment could not

> "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi."

1834 Act, § 29.

Apart from the quote discussed above, legislative history on the precise question before the court is not helpful. As the State of Maine, amicus curiae, has indicated:

> "Congressional debates and committee reports on the territorial applicability of the Acts are, admittedly, scanty."

Both parties appear to concede that the Continental Congress, which operated under the Articles of Confederation, enacted a proclamation governing relations with Indians which explicitly left to the States the right to govern Indian affairs within their boundaries.[17] In fact, the Continental Congress had no other choice, for the Articles of Confederation conferred no greater powers on it.[18] Both parties also agree that the Constitution, as it finally became effective in 1789, greatly expanded the powers of the government to deal with Indians.[19] The dispute between the parties arises over the extent to which Congress chose to exercise its new-found powers. Defendant argues that since the post-Constitution Congress was faced with the same problems and was composed of many of the same individuals as the Continental Congress, it only intended to exercise its powers to the same extent as they previously had been exercised. This, however, is hardly an automatic conclusion. A legislature constrained by an exceedingly weak grant of authority will not necessarily exhibit a similar degree of self-restraint when the external constraints are removed.[20] Nor is there such a similarity of language between the proclamation of the Continental Congress and the 1790 Act as would make the

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[17]1 Laws U.S. 607-608.

[18]Articles of Confederation, Article IX.

[19]U.S. Const., art. I, § 8, cl. 3 provides:

> "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . ."

[20]In fact, several contemporaries suggested the contrary. When George Washington spoke to the Seneca tribe of New York Indians in 1790 he stressed to them that the United States Constitution and subsequent acts of Congress represented a significant change from the previous situation.

> "I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. *But the case is now entirely*

defendant's construction appear likely. The proclamation applied "without the limits or jurisdiction of any particular State," while the Nonintercourse statute of 1790 was expressly made applicable "within the United States." As the Court of Appeals for the First Circuit has noted in a slightly different context:

> "[W]e find an inclusive reading consonant with the policy and purpose of the Act. That policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941), *rehearing denied*, 314 U.S. 716, 62 S.Ct. 476, 86 L.Ed. 570 (1942), and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S.Ct. 543, 4 L.Ed.2d 584, *rehearing denied*, 362 U.S. 956, 80

> *altered;* the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding."

4 American State Papers 142 (1 Indian Affairs, 1832) (emphasis added).

Chief Justice Marshall put it more directly in his opinion for the Court in Worcester v. Georgia, 31U.S. (6 Pet.) 515, 559 (1832):

> "The correct exposition of this article [in the Articles of Confederaton] is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded."

> S.Ct. 858, 4 L.Ed.2d 873 (1960); *United States v. Candelaria*, 271 U.S. 432, 441, 46 S.Ct. 561, 70 L.Ed. 1023 (1926). Since Indian lands have, historically, been of great concern to Congress, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), we have no difficulty in concluding that Congress intended to exercise its power fully."

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975).

Connecticut has also collected a vast array of historical writings and records which demonstrate that George Washington and Henry Knox, two of the primary architects of the Trade and Intercourse Acts, were principally concerned with placating the frontier Indians and minimizing friction on our young nation's western borders. This, of course, is undeniable, and the plaintiff does not contend otherwise. This court, however, finds it worthy of some note that in spite of the extensive research efforts by the defendant and the State of Maine, as amicus, neither have been able to unearth any writings which establish that peace on the frontier and the maintenance of treaty obligations were the *sole* objectives of the legislation. But no other reasons are given to speculate.

It is particularly difficult to understand why there is no language from the sponsors of the Act designed to reassure individual states that their prerogatives in Indian affairs were not being changed, when the Act, on its face, appeared to sweep so broadly. The historical backdrop for the enactment of these Acts is dominated by conflicts between those who favored a strong central government and those who favored maintaining maximum state autonomy. Certainly, passage of the Acts would have been expedited had George Washington or other advocates of the measures been able to minimize the

extent of "states-rights" opposition. Nonetheless, no such language has been brought to the court's attention.

Nor is it inconceivable that Washington's plan to preserve peace on the frontiers included concessions to Eastern Indians as some evidence of the United States' sincerity of purpose. As early as 1790, George Washington was addressing frontier tribes in an effort to convince them that the national approach to Indian affairs had changed.[21] Statutes which demonstrated a genuine intent to end the evils associated with encroachment on Indian land wherever situated would be substantial evidence of such a change.

Thus, while the history as presented by the defendant may have some probative value, it is not without ambiguity. The court is mindful of the principle that statutes are generally to be construed in light of the mischief to be remedied, *Liberation News Service v. Eastland*, 426 F.2d 1379, 1383 (2d Cir. 1970), but such an admonition is difficult to follow where the specific "mischief" is difficult to identify.

Finally, Connecticut and the State of Maine, as amicus, have developed an extensive argument based on "jurisdictional history." Jurisdictional history is a tool which is sometimes used to establish the meaning of a statute by determining which entities assert jurisdiction after a statute is enacted. While a history of such interaction is significant and lends some credence to the defendant's motion, extensive reliance on jurisdictional history under the circumstances in this case is inappropriate. Here, instead of a dispute where daily behavior can be said to have established a general understanding, this case involves a handful of land "sales" concluded over a hundred years ago. Neither the federal government's failure to

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[21]4 American State Papers 142 (1 Indian Affairs, 1832) (Speech to Seneca Indians of New York).

intervene and declare the sales void for the efforts of Connecticut to extinguish Indian title without federal approval in the late 18th or early 19th centuries can be said to have established the meaning of 25 U.S.C. § 177 and its predecessors.

In fact, one court recently faced with a claim under 25 U.S.C. § 177, a claim which was far more conducive to proof by jurisdictional history than is the claim in this case,[22] found that even virtually uninterrupted exercise of state jurisdiction could not alter the federal government's role as envisioned in the statute. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton, supra*, the State of Maine placed before the First Circuit virtually the identical arguments it raises here as amicus in an effort to convince that court that the statute did not provide for a federal trust relationship with the Passamaquoddy Indian tribe. In spite of the fact that all of the jurisdictional history was to the contrary, the First Circuit concluded that the federal government's fiduciary status with respect to the protection of Indian lands was established "beyond question. . . . from the history, wording and structure of [25 U.S.C. § 177] . . . ." 528 F.2d at 379. It noted further that "[t]he reasons behind Congress' inaction are too problematical for the matter to have meaning for purposes of statutory construction." *Id.* at 378.

Thus, while the defendant's historical arguments may cast some doubt on the meaning of the statute, they, at best, add a

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[22]In Joint Tribal Council of Pasamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), the issue was whether the United States had a "trust relationship" with the Passamaquoddy Indian tribe. The tribe claimed that the Nonintercourse statute created a fiduciary relationship. Unlike a handfull of land sales, a trust "relationship" necessarily implies repeated and numerous contacts between the guardian and its ward, and would therefore appear to be more amenable to proof by jurisdictional history than is the claim advanced by the defendants here.

shade of ambiguity to an otherwise relatively unambiguous statute. As one court has noted: "the plainer the language, the more convincing contrary legislative history must be." *United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909 (1973). When considered in light of the Supreme Court's admonition that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful constructions being resolved in favor of the Indians," *Wilson v. Omaha Indian Tribe*, 47 U.S.L.W. 4758, 4761 (U.S. June 20, 1979), it is clear that the defendant has failed to carry its burden of establishing a contrary legislative history sufficient to overcome the apparent meaning of the statute, discernable from the language of the Act alone.

Case Law

Both parties insist that the relevant case law on this issue substantiates their claims, and both set forth exhaustive discussions of early 19th century cases as well as opinions rendered in the last decade. In spite of extensive searches by both parties, however, there is apparently no reported opinion which specifically rules on the geographic applicability of the land transfer section of the Trade and Intercourse Act. In other words, this precise issue appears to be a question of first impression.[23]

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[23]Several other courts have come very close to deciding this issue. In Oneida Indian Nation v. County of Oneida, 434 F. Sup. 527, 540 (N.D.N.Y. 1977), *on remand from* 414 U.S. 661 (1974), Judge Port noted that the Nonintercourse statute applied in New York in spite of the facts that New York was one of the original 13 states. That case does not necessarily resolve the issue here since the Oneida Indian Nation had the benefit of a federal treaty and may have been located to the west of the "Indian country" boundary lines during the early 1790's.

In Narragansett Tribe v. Southern Rhode Island Land Development Corp., *supra* at 803, 804, Chief Judge Pettine appears implicitly to have resolved the question in favor of the Indians, although it is not clear that the issue was directly presented by the parties.

While the early Supreme Court cases are of some assistance in resolving this particular question, they are difficult to decipher and even more difficult to apply. Most do not even discuss the Nonintercourse statutes and focus instead on constitutional and jurisprudential concepts. Moreover, the florid style of the early opinions converts many of them into "litigant[s'] wishing-well[s] into which, it sometimes seems, one may peer and find nearly anything he wishes." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979).

Fortunately, however, this court need not wade through the dense prose of this country's earliest jurists, for this task has already been done by Justice White in his opinion for the Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-78 (1974). There, after an extensive review of prior case law, the Court concluded:

> "It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original States and the United States — a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New

> York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that 'no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.' This has remained the policy of the United States to this day. See 25 U.S.C. § 177.
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> ". . . .
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> "*The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.* It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law."

Id. at 667, 668, 670 (footnotes omitted) (emphasis added).

It is true that the precise issue raised here was not before the Court in *Oneida*. There, the Oneida Indian Nation had filed a suit in federal court claiming a right to possession of lands and had based its claim, as do the Indians here, on 25 U.S.C. § 177. The defendants in *Oneida* moved to dismiss the action on the grounds that the court lacked federal question jurisdiction. Under the "well-pleaded complaint" doctrine the test which the Supreme Court applied was whether the Indians' claim was

not "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court . . . ." *Id.* at 666. In resolving this question the Court concluded:

> "*given the nature and source of the possessory rights of Indian tribes to their aboriginal lands*, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362."

Id. at 667 (emphasis added). Thus, where the Supreme Court apparently needed only to conclude that the Indians asserted a colorable claim, its discussion went further and virtually settled the question of the geographical applicability of 25 U.S.C. § 177.

To this extent, the Supreme Court language may be considered dictum, as the defendant suggests, since its reach was further than required under the circumstances. Nonetheless, it was necessary for the Court at least to consider the Indians' claim, the territorial applicability of 25 U.S.C. § 177, and the question whether section 177 applied outside of Indian country. The latter question was explicitly put in issue by the brief and argument of one of the litigants before the Court. At worst, then, the explicit discussion of the Supreme Court in *Oneida* is reasoned dictum. Contrary to Connecticut's argument, the mere fact that the language might be considered dictum does not permit this court to "cavalierly disregard it . . . . While such dictum is not binding upon [the court], it must be given considerable weight and can not be ignored in the resolution of the close question [this court has] to decide." *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975); *see Warren v. Harvey*, 472 F. Supp. 1061, 1072 (D.C. Conn. 1979). Since the *Oneida* opinion reaches the same conclusion that this court has

reached after considering the language and the history of the Act, the *Oneida* Court's analysis and conclusions based on prior case law provide substantial additional support for the plaintiff's position, if indeed, they are not controlling.[24]

Defendant argues that a very recent Supreme Court decision undercuts the force of the language in *Oneida*. In the case of *Wilson v. Omaha Indian Tribe, supra*, the Court, again by Justice White, reasoned that section 22 of the 1834 Trade and Intercourse Act was intended to apply solely in Indian country. Defendant argues that this is entitled to significance here because section 22, like the section on land conveyances, contains no express geographical limitations. Thus, the defendant argues, the Supreme Court has impliedly held that all sections of the Trade and Intercourse Acts are similarly limited.

While there may be some merit to the argument, this court does not attribute much significance to it. Section 22 deals only with a procedural rule which places the burden of proof on a "white person" in any civil dispute with an Indian over property. The precise question before the Supreme Court was whether the State of Iowa was a "white person" under the statute. In reaching the conclusion that Iowa was not a "white person," the Court did not have to rule that the Act applied only in Indian country. Unlike *Oneida*, the Court did not consider prior case law nor did it elaborate on this point. Throughout the opinion, *Oneida* is cited favorably with no hint that it was being overruled *sub silentio*.

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[24]On remand from the Supreme Court's decision in *Oneida, supra*, Judge Port concluded that the Supreme Court's language established the geographic applicability of 25 U.S.C. § 177. In other words, the Supreme Court's treatment of this question was not considered solely as dicta, but rather was treated as binding on the District Court. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 540 (N.D.N.Y. 1977).

Furthermore, there is a noteworthy distinction between section 22 and the Nonintercourse section at issue here. Section 22, unlike most of the sections of the Trade and Intercourse Act, was first added to the Act as late as 1822. Unlike the land conveyance section, it is not based on prior provisions dating back to 1790, shortly after the ratification of the Constitution. In particular, unlike the land conveyance section, section 22 was not based on a history of prior enactments, each of which expressly indicated that the section was applicable throughout the United States.[25]

Therefore, for the reasons stated above, this court concludes that *Wilson v. Omaha Indian Tribe* has not altered the import of the Supreme Court's clear expression in *Oneida*. *Oneida*, with its summary of prior case law, stands as strong support for the plaintiff's position.

Conclusion

"For purposes of this motion [the court] may look only at the pleadings, with all of the 'well-pleaded material facts alleged in the complaint . . . taken as admitted' . . ., and the

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[25]Justice White himself was unwilling to extend the interpretation of the words "white person" in section 22 to any other section of the Act, in spite of the urging of two concurring members of the Court. The Court refused to do so because the other provision in the Act which used the words "white person," section 16, had a different and "distinct legislative history." Wilson v. Omaha Indian Tribe, *supra*, at 4761 n.16. Section 16, like the land conveyance section and unlike section 22, had predecessor provisions in every Act since 1790. Because the history of section 16 parallels that of the land transfer section at issue here, the Court's refusal to extend its ruling to section 16 based on a "distinct legislative history" is some evidence that the *Wilson* dictum should not be extended to other provisions of the Act.

complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir. 1977) (citations omitted). Since the Nonintercourse statute is applicable to the lands at issue here, it is clear that the complaint of the Mohegan Tribe does state a claim upon which relief may be granted. Therefore, the defendant's motion is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 17th day of January, 1980.

M. JOSEPH BLUMENFELD
United States District Judge

APPENDIX C

Act of 1790, ch. 33, 1 Stat. 137

SECTION 1. That no person should be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose, under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose; which superintendent, or other person so appointed, shall, on application, issue such license to any proper person, who shall enter into bond, with one or more sureties, approved of by the superintendent, or person issuing such licensing, or by the President of the United States, in the penal sum of one thousand dollars, payable to the President of the United States for the time being, for the use of the United States, conditioned for the true and faithful observance of such rules, regulations, and restrictions, as now are, or hereafter shall be, made for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons by them licensed as aforesaid, shall be governed in all things, touching the said trade and intercourse, by such rules and regulations as the President shall prescribe. And no other person shall be permitted to carry on any trade or intercourse with the Indians, without such license as aforesaid. No license shall be granted for a longer term than two years: *Provided, nevertheless*, That the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.

SECTION 2. That the superintendent, or person issuing such license, shall have full power and authority to recall all such licenses as he may have issued, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken,

immediately on the breach of any condition in said bond: *Provided always*, That if it shall appear, on trial, that the person from whom such license shall have been recalled, has not offended against any of the provisions of this act, or the regulations prescribed for the trade and intercourse with the Indian tribes, he shall be entitled to receive a new license.

SECTION 3. That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

Act of 1790, ch. 33, 1 Stat. 137 § 4.

SECTION 4. *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

SECTION 5. That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any State, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such State or district, such offender or offenders shall be subject to the same

punishment, and shall be proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the State or district to which he or they may belong, against a citizen or white inhabitant thereof.

SECTION 6. That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning, or bailing, the offender, as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offences against the United States.

SECTION 7. That this act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.

Act of 1793, ch. 19, 1 Stat. 329

SECTION 1. That no person shall be permitted to carry on any trade or intercourse with the Indian tribes without a license under the hand and seal of the Superintendent of the Department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose; which Superintendent, or person so authorized, shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond, with one or more sureties, approved of by the Superintendent, or person issuing such license, or by the President of the United States, in the panel sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations, and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes.

The said Superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations as the President of the United States shall prescribe.

SECTION 2. That the Superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

SECTION 3. That every person who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession in the Indian country, and shall, moreover, be liable to a fine, not exceeding one hundred dollars, and to imprisonments not exceeding thirty days, at the discretion of the Court in which the trial should be: *Provided*, That any citizen of the United States, merely traveling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

SECTION 4. That, if any citizen or inhabitant of the United States, or of either of the Territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any State, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such State or district, such offender shall be subject to the same punishment,

as if the offence had been committed within the State or district to which he or she may belong, against a citizen thereof.

SECTION 5. That, if any such citizen or inhabitant shall make a settlement of lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum, not exceeding one thousand dollars nor less than one hundred dollars, and suffer imprisonment, not exceeding twelve months, in the discretion of the Court before whom the trial shall be: and it shall, moreover, be lawful for the President of the United States to take such measures as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make, a settlement thereon.

SECTION 6. That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license the Superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: *Provided, also*, That every person who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return to the Superintendent, or other person from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses by their color, height, and other natural or artificial marks, under the penalties contained in their respective bonds. And every person purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one

hundred dollars, nor less than thirty dollars, to be recovered in any Court of Record having competent jurisdiction. And every person who shall purchase a horse, knowing him to be brought out of the Indian territory by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse; one-half for the benefit of the informant, the other half for the use of the United States, to be recovered as aforesaid.

SECTION 7. That no agent, superintendent, or other person, authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the Court, before which the conviction shall be had, not exceeding twelve months.

Act of 1793, ch. 19, 1 Stat. 329

SECTION 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and

adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 9. That, in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States to cause them to be furnished with useful domestic animals and implements of husbandry, and also to furnish them with goods or money, in such proportions as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided*, That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

SECTION 10. That the Superior Courts of each of the said Territorial districts, and the Circuit Courts, and other Courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with, full power and authority, to hear and determine all crimes, offences, and misdemeanors, against this act; such Courts proceeding therein in the same manner as if such crimes, offences and misdemeanors, has been committed within the bounds of their respective districts: and in all cases where the punishment shall not be death, the County Courts of Quarter Sessions in the said Territorial districts, and the District Courts of the United States in their respective districts, shall have, and are hereby invested with, like power to hear and determine the same.

SECTION 11. That it shall and may be lawful for the President of the United States, and for the Governors of such Territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said

crimes, offences, or misdemeanors, within any town, settlement, or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases where the punishment shall be death, it shall be lawful for the Governor of the district into which the offender may be first brought, or in which he may be apprehended, to issue a commission of Oyer and Terminer to the Superior Judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the Superior Courts of such districts have, in their ordinary sessions. And when the offender shall be brought into, or shall be apprehended in, any of the United States, except Kentucky, it shall be lawful for the President of the United States to issue a like commission to any two Judges of the Supreme Court of the United States and the Judge of the district, in which the offender may have been apprehended or first brought; which Judges, or any two of them, shall have the same jurisdiction, in such capital cases, as the Circuit Court of such district, and shall proceed to trial and judgment, in the same manner as such Circuit Court might or could do.

SECTION 12. That all fines and forfeitures, which shall accrue under this act, shall be, one-half to the use of the informant, and the other half to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SECTION 13. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

SECTION 14. That all and every other act and acts, coming within the purview of this act, shall be, and are hereby, repealed.

SECTION 15. That this act shall be in force for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

Act of 1796, ch. 30, 1 Stat. 469

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of Cayahoga river on Lake Erie, and running thence up the same, to the portage between that end and the Tuscaroras branch of the Muskingum; thence down that branch, to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the Great Miami river, running into the Ohio, at, or near which fork, stood Laromie's store, and where commences that portage, between the Miami of the Ohio, and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; thence southwesterly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clark, for the use of himself and his warriors; thence around the said tract, on the line of said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence easterly on the said right, to a point, from whence, a southwest line will strike

the mouth of Duck river; thence still easterly on the said ridge, to a point forty miles above Nashville; thence northwest, to Cumberland river; thence up the said river to where Kentucky road crosses the same; thence to the top of Cumberland mountain; thence along Campbell's line, to the river Clinch; thence down the said river, to a point from which a line shall pass the Holsten, at the ridge, which devides the waters running into Little River, from those running into the Tennessee; thence south, to the North Carolina boundary; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugelo river; thence in a direct line, to the top of the Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's; *Provided always*, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

Act of 1796, ch. 30, 1 Stat. 469

SECTION 2. That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in anywise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

SECTION 3. That if any such citizen, or other person, shall go into any country which is allotted or secured by treaty as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the Governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person as the President of the United States may from time to time authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned, not exceeding three months.

SECTION 4. That if any such citizen, or other person shall go into any town, settlement, or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any State, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall, also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed; and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the Treasury of the United States: *Provided, nevertheless*, That no such Indian shall be entitled to any payment out of the Treasury of the United States for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

SECTION 5. That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or

granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title, and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make, a settlement thereon; and every right, title, or claim, forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender, without any other or further proceeding.

SECTION 6. That if any such citizen, or other person shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

SECTION 7. That no such citizen, or other person, shall be permitted to reside at any of the towns or hunting camps, or any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the

United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions as are or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recal the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

SECTION 8. That any such citizen, or other person, who shall attempt to reside in any town or hunting camp of any of the Indian tribes as a trader, without such license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

SECTION 9. That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians in their intercourse with white people, or any article of clothing, except skins or furs, he shall forfeit a sum not exceeding firty dollars, and be imprisoned not exceeding thirty days.

SECTION 10. That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions, and restrictions, as other licenses are to be granted under this act. And any such person who shall purchase a horse or horses under such license, before he exposes such horse or horses for sale, and within fifteen

days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, aforesaid; describing such horses by their color, height, and other natural or articial marks, under the penalty contained in their respective bonds. And every such person purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed as above to purchase the same, shall forfeit the value of such horses.

SECTION 11. That no agent, superintendent, or other person, authorized to grant a license to trade or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse to or from any Indian, excepting for and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve

months: *Provided nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence and with the approbation of the commissioner or commissioner of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 13. That, in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided*, That the whole amount of such presents and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

SECTION 14. That if any Indian or Indians belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any State or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a

reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification: *Provided, always,* That if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: *And provided, also,* That nothing herein contained shall prevent the legal apprehension or arresting within the limits of any State or district of any Indian having so offended: *And provided, further,* That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed by any such Indian, out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

SECTION 15. That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences, and misdemeanors, against this act; such courts proceeding therein in the same manner, as if such crimes, offences, and misdemeanors, had been committed within the bounds of their respective districts: and in all cases where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall

have, and are hereby invested with, like power to hear and determine the same, any law to the contrary notwithstanding: and in all cases where the punishment shall be death, it shall be lawful for the Governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such district have in their ordinary session: and when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States to issue a like commission to any one or more judges of the Supreme Court of the United States, and the judge of the district in which such offender may have been apprehended, or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases as the circuit court of such district, and shall proceed to trial and judgment in the same manner as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences, and misdemeanors, committed against this act, and shall proceed to trial and judgment, in the same manner as the circuit courts of the United States.

SECTION 16. That it shall be lawful for the military force of the United States, to apprehend every person who shall or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining States or districts, to be proceeded against in due course of law: *Provided*, That no person apprehended by military force as aforesaid, shall be detained longer than ten days after the arrest and before removal.

SECTION 17. That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner as if such crime or offence had been committed within such State or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate or any proper officer, or other person duly authorized for that purpose and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized as aforesaid in arresting such offender, and him committing to safe custody, for trial according to law.

SECTION 18. That the amount of fines and duration of imprisonment directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court before whom the trial shall be had; and that all fines and forfeitures which shall accrue under this act shall be one half to the use of the informant and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SECTION 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

SECTION 20. That the President of the United States be and he is hereby authorized to cause to be clearly ascertained and distinctly marked, in all such places as he shall deem

necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe which now are or hereafter may be established by treaty.

SECTION 21. That all and every other act and acts, coming within the purview of this act, shall be and they are hereby repealed: *Provided nevertheless*, That all disabilities that have taken place shall continue and remain, all penalties and forfeiture that have been incurred may be recovered, and all prosecutions and suits that may have been commenced may be prosecuted to final judgment under the said act or acts, in the same manner as if the said act or acts were continued and in full force and virtue.

SECTION 22. That this act shall be in force for the term of two years, and from thence to the end of the session of Congress next thereafter, and no longer.

Act of 1799, ch. 46, 1 Stat. 743,[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following boundary line, established by treaty between the United States and various Indian tribes shall be clearly ascertained and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that . . . . the said old line to the river Saint Mary's: *Provided always*, that if the boundary line between the said Indian tribes and the United States, shall, at

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[1]Sections 2 through 10, 13 through 15, and 17, 18 and 20 are similar in language to the identically numbered sections in the Act of 1796 and will not be repeated.

any time hereafter, be varied by any treaty which shall be made between the said Indian tribes and the United States, then all provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner as said provisions apply by force of this act to the boundary line herein before recited.

SECTION 11. *And be it further enacted*, That no agent, superintendent, or other person, authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any ndian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by treaty or convention, entered into, pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceding one thousand dollars, and imprisonment not exceeding twelve months: *Provided, nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 16. That it shall be lawful for the military force of the United States, to apprehend every person who shall, or may, be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest, convenient, and safe route, to the civil authority of the United States, in some one of the three next adjoining States or districts, to be proceeded against in due course of law: *Provided*, That no person apprehended by military foce, as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers, who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court martial shall direct: *Provided*, That the officer having custody of such person or persons, shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any State, who, if the offence is bailable, shall take proper bail, if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

SECTION 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person

or person traveling from Knoxville to Price's settlement (so-called) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said trace, after which, the penalties of this act shall be incurred by every person travelling or being found on said trace, within the Indian boundary without a passport.

SECTION 21. That this act shall be in force from and after the third day of March, one thousand seven hundred and ninety-nine, and shall continue in force the term of three years; and, so far as respects the proceedings under this act, it is to be understood that the act, entitled "An act to amend an act, entitled 'An act giving effect to the laws of the United States within the district of Tennessee,' " is not to operate. And all disabilities which have taken place, shall continue and remain; and all penalties and forfeitures that have been incurred, may be recovered; and all prosecutions and suits which may have been commenced, may be prosecuted to final judgment, under the act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers; which act expires, by its own limitation, on the third day of March, one thousand seven hundred and ninety-nine, in the same manner as if the said act was continued in force.

Act of 1802, ch. 13, 2 Stat. 139,[2]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress*

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[2]Sections 2, 3, 6 through 8, 11, 14, 15, 17, 18 and 20 are similar in language to the identically numbered sections in the Act of 1796 so they won't be repeated.

Section 16 is similar in language to Section 16 of the Act of 1799 so it won't be repeated.

assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in all such places as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: . . . *Provided always*, that if the boundary line between he said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as said provisions apply, by force of this act, to the boundary line herein before recited.

SECTION 4. That if any robbery, larceny, trespass, or any other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any State, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding on-hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed; and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the Treasury of the United States: *Provided, nevertheless*, That no such Indian shall be entitled to any payment out of the Treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempt to obtain satisfaction by any force or violence.

SECTION 5. That if any such citizen, or other person, shall make a settlement on any lands belonging or secured, or granted by treaty with the United States, to any Indian tribe, or

shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary, to remove from lands, belonging or secured by treaty, as aforesaid, to any Indian tribe, any such citizen, or other person, who has made, or shall hereafter make, or attempt to make a settlement thereon.

SECTION 9. *And be it further enacted*, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

SECTION 10. *And be it further enacted*, That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions, and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him as aforesaid; describing such horses by their color, height, and other natural or artificial marks, under the penalty contained in their respective bonds; and every such person purchasing a horse or horses, as aforesaid, in the Indian country, without a

special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days; and every person who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons. not licensed, as above, to purchase the same, shall forfeit the value of such horse.

SECTION 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exeeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided, nevertheless,* that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of he United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 13. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided,*

That the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

SECTION 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river (so called), provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which, the penalties of this act shall be incurred by every person travelling or being found on said traces, or either of them, to which the prohibition may apply, within the Indian boundary, without a passport.

SECTION 21. That the President of the United States be authorized to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spiritous liquors among all or any of the said Indian tribes, anything herein contained to the contrary thereof notwithstanding.

SECTION 22. That this act shall be in force from the passage thereof; and as far as respects the proceedings under this act, it is to be understood that the act, entitled "An Act to amend an act, entitled 'An act giving effect to the laws of the

United States within the district of Tennessee,' " is not to operate.

Act of 1834, ch. 161, 4 Stat. 729

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

SECTION 2. That no person shall be permittd to trade with any of the Indians (in the Indian country) without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on withi their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be the duty of the persons

granting or revoking such licenses, forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.

SECTION 3. That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country; or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the Superintendent, to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

SECTION 4. That any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.

SECTION 5. That no license to trade with the Indians shall be granted to any person except citizens of the United States: *Provided,* That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.

SECTION 6. That if a foreigner shall go into the Indian country without a passport from the War Department, the superintendent, agent, or sub-agent of Indian affairs, or from

the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

SECTION 7. That if any person other than an Indian shall within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.

SECTION 8. That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.

SECTION 9. That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

SECTION 10. That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

SECTION 11. That if any person shall make a settlement on any lands belonging secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless*, That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by treaty.

SECTION 13. That if any citizen or other person residing within the United States or the territory thereof, shall sent any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquility of the United States, he shall forfeit and pay the sum of two thousand dollars.

SECTION 14. That if any citizen, or other person, shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject,citizen, or agent of any foreign power or state, knowing the contents thereof, he shall forfeit and pay the sum of one thousand dollars.

SECTION 15. That if any citizen or other person, residing or living among the Indians, or elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.

SECTION 16. That where, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment, out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also*, That if such offender cannot be apprehended and brought

to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

SECTION 17. That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the mean time, in respect to the property so taken, stolen or destroyed, the United States guaranty, to the party so injured, an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That, unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal

apprehension and punishment of any Indians having so offended.

SECTION 18. That the superintendents, agents, and sub-agents, within their respective districts, be, and are hereby, authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the two preceding sections of this act, and to administer an oath to the deponents.

SECTION 19. That it shall be the duty of the superintendents, agents, and sub-agents, to endeavor to procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of th United States to be employed in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes.

SECTION 20. That if any person shall sell, exchange, or give, barter, or dispose of, any spiritous liquor or wine to any Indian, (in the Indian country,) such person shall forfeit and pay the sum of five hundred dollars; and if any person shall introduce, or attempt to introduce, any spiritous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is abot to introduce, or has introduced, any spiritous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superinten-

dent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any such spiritous liquor or wine is found, the goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, and for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.

SECTION 21. That if any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or continued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.

SECTION 22. That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

SECTION 23. That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and

him immediately to convey from said Indian country, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforsaid, shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court-martial shall direct.

SECTION 24. That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri: west, by the Mexican possessions; south by Red river; and east, by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid, *the several portions of Indian country east of the said Mississippi river, shall be, and are hereby, severally annexed to the territory in which they are situate.*

SECTION 25. That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country:

Provided. The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

SECTION 26. That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territories, such offenders may be there apprehended, and transported to the territory or judicial district having jurisdiction of the same.

SECTION 27. That all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (in any state or territory in which the defendant shall be arrested or found,) the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SECTION 28. That when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

SECTION 29. That the following acts and parts of acts shall be, and the same are hereby, repealed, namely: An act to make provision relative to rations for Indians, and to their visits to the seat of government, approved May thirteen, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine,

eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen; an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other purposes," (a) approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Akansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four; the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a sub-agent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however*, That such repeal shall not effect [affect] any right acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor

impair or affect the intercouse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also*, That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

SECTION 30. That until a western territory shall be established, the two agents for the Western territory, as provided in the act for the organization of the Indian department, this day approved by the President, shall execute the duties of agents for such tribes as may be directed by the President of the United States. And it shall be competent for the President to assign to one of the said agents, in addition to his proper duties, the duties of superintendent for such district of country or for such tribes as the President may think fit. And the powers of the superintendent at St. Louis, over such district or tribes, as may be assigned to such acting superintendent, shall cease: *Provided*, That no additional compensation shall be allowed for such services.

SECTION 29. *And be it further enacted*, That the following acts and parts of acts shall be, and the same are hereby repealed namely: . . . *Provided, however*, That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also*, That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

25 U.S.C. § 177 (1963).

No purchase, grant, lease, or other convenience of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the

same be made by treaty or convention entered into pursuant to the Constitution . . . .

APPENDIX D

Land
29306-1899

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

July 10, 1899.

Francis M. Morrison, Esq.,
492 Main St.,
Worcester, Mass.

Sir:—

With reference to certain contracts between the Mohegan, Shinnecock and Narragansett tribes or bands of Indians and yourself, the following communication, dated June 23, 1899, addressed to this office by the Honorable Acting Secretary of the Interior, is furnished for your information:—

"I am in receipt of your letter of the 10th instant, transmitting a contract (in triplicate) executed on the 8th ultimo, by persons purporting to represent the Mohegan tribe of Indians of Connecticut, and Francis M. Morrison, attorney at law, of Worcester, Mass., and a similar contract, executed on the 12th ultimo, by persons purporting to represent the Shinnecock tribe of Indians of New York, and the same party: also of your letter of the 16th instant, transmitting a like contract, executed on the 8th instant by parties purporting to represent the Narragansett tribe of Indians of Rhode Island and Mr. Morrison.

All of these contracts stipulate for the employment of Mr. Morrison to prosecute the claims of the several tribes and of the individual members thereof to distributive shares of the amount awarded by the Court of Claims in the suit of the New York Indians vs. The United States, for compensation for lands in Kansas set apart for the New York Indians by the Treaty of

Buffalo Creek, January 15, 1838, it appearing that each of these tribes claims an interest in the aforesaid judgment through alleged relationship with the Brothertown band or clan, a branch of the New York Indians.

For the reasons stated in your letter you have approved the said contracts, which provide for a fee of thirty-five per cent of the amounts that may be recovered, and submit the same for such action as may seem appropriate.

These Indians were and their remnants are residents of a section of that portion of the country which constituted the territory of the thirteen original States, as recognized by Great Britain in 1783. No treaties of agreements were ever made with them by the general government, nor has it ever exercised any supervision or control over them. Their political status is unknown, but it is presumed that they are citizens and subject to the laws of the several States in which they reside, and entitled to the rights and privileges of such citizenship.

Their political condition is, therefore, radically different from that of what might be termed the "plains" Indians, that large body of persons in the western section of the country who became subjects or wards of the government with the accession of territory ceded by France in 1803; by the annexation of Texas in 1845; with the territory ceded by Mexico in 1848, and by the cession known as the Gadsden Purchase, in 1853, not all of whom, however, have been officially recognized as wards by formal treaty or agreement.

All of these "plains" Indians have been at some time or other, in some manner or other, the subject of legislation by the Congress of the United States, and to that extent recognized by the Government, so that contracts with them, to be valid and binding, unless, in the meantime, they have become citizens of the United States by the formal action of Congress, require the approval of the Secretary of the Interior.

But the Mohegans, Shinnecocks, and Narragansetts appearing to be citizens of the United States, the Secretary of the Interior is without authority to approve the contracts in question, and the same are returned for such disposition as may seem to be appropriate."

Very respectfully,

/s/ W. A. Jones

Commissioner.

E.B.F.

C

APPENDIX E

Mrs. Edith M. Smith,
904 West Superior Street,
Alma, Michigan.

Oct. 12, 1931

Dear Madam:

The receipt is acknowledged of your letter of October 1, relative to the possibility of governmental assistance on account of your deceased husband's Indian ancestry. You say that Mr. Smith was a quarter-blood Connecticut Indian of the Penobscott Tribe.

The Indians of Connecticut are not under Federal jurisdiction or control, being in the category of so-called "State" Indians. They have never been regarded as wards of the United States, which under the decisions of the Comptroller General precludes the expenditure of funds for their benefit at our disposal. It is, therefore, regretted that we cannot render you any assistance.

We have no record as to births and deaths among these Indians. Perhaps the State Bureau of Vital Statistics at Hartford, Connecticut, could supply you with the desired information if available.

Sincerely yours,

(Signed) C. J. Rhoads

Commissioner.
Mcy.

10-jma-9

NO. 80-1365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT,
Petitioner

v.

MOHEGAN TRIBE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JEROME M. GRINER
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West Hartford, Connecticut 06107
(203) 527-5216

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Argument

I. The statutory language and intent of Congress is clear; the land transfer section of the Trade and Intercourse Acts applies to tribal land throughout the United States, in Connecticut and Maine, as well as elsewhere. 1

II. Petitioner's erroneous assertions about alleged prevailing case law and alleged executive branch interpretations have all been answered by the decisions of both lower Courts herein. 2

III. No reason even approaching in character those required under Rule 17 is given by Petitioner in its application. 3

IV. The Supreme Court ought not give its approval to land transfers made in violation of Federal law. 3

Had the Petitioner complied with the law, land titles would be certain; it is because of violations of the law that Petitioner's title is now questioned.

Conclusion 4

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the land transfer sections of the Trade and Intercourse Acts applied to lands such as tribal lands in Connecticut and Maine, which lands did not lie in "Indian Country"?

2. Did the Court of Appeals err in holding that the "surrounded by settlements of citizens of the United States" exception was applicable only to certain sections of the Acts dealing with "trade" and "intercourse", and is not applicable to the land transaction section of the Acts.

OPINIONS BELOW

JURISDICTION

STATUTORY PROVISIONS INVOLVED

Respondent does not question Petitioner's statements concerning the lower Court opinions, jurisdiction of this Court nor concerning the statutory provisions involved.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct, with the following notations:

1. As of July 22, 1790 and thereafter the Mohegan Tribe was residing on tribal lands reserved to themselves from time immemorial and/or sequestered for their use (this may be of no significance to issues raised by the instant petition).

2. The Court of Appeals decided that the "surrounded by settlements" exception applied to "trade and intercourse", and not to land transfers.

ARGUMENT

I.

THE STATUTORY LANGUAGE AND INTENT OF CONGRESS IS CLEAR: THE LAND TRANSFER SECTION OF THE TRADE AND INTERCOURSE ACTS APPLIES TO TRIBAL LAND THROUGHOUT THE UNITED STATES, IN CONNECTICUT AND MAINE, AS WELL AS ELSEWHERE.

Petitioner seeks to review the Second Circuit's unanimous holding (Appendix, pp. 26a and 29a) that the land transaction section of the series of Trade and Intercourse Acts

(currently 25 U.S.C. § 177) applies to eastern Indian lands and to Indian lands throughout the United States and that its applicability is not limited to Indian country.

Despite Petitioner's lengthy efforts to show an alleged intention of Congress (which intention neither the District Court nor any member of the 3-Judge Circuit Court found) that the land transaction section of the Acts does not apply in eastern United States, the simple answer, in addition to the clear wording of the section itself, is that *Congress itself has now clearly spoken as to this intention*, by way of Public Law 96-420, signed into law on October 10, 1980, and known as the "Maine Indians Claims Settlement Act of 1980", which appropriates $81,500,000.00 for extinguishing the land claims of certain Maine Indians based on violations of the same Acts as are relied upon in this instant action. If these Acts didn't apply east of Indian country, Congress surely would not have appropriated $81,500,000.00 for such purpose, because the legislative history of P. L. 96-420 shows that violation of the land transfer section of the Trade and Intercourse Acts was the sole basis for the claims which were settled by the legislation.

II.

PETITIONER'S ERRONEOUS ASSERTIONS ABOUT ALLEGED PREVAILING CASE LAW AND EXECUTIVE BRANCH INTERPRETATIONS HAVE ALL BEEN ANSWERED BY THE DISTRICT COURT AND COURT OF APPEALS DECISIONS.

The opinions of the District Court and of the Second Circuit Court of Appeals, printed in Petitioner's Appendix (pp. 3a-29a; 30a-52a), amply rebut Petitioner's erroneous contentions.

III.

NO SPECIAL OR IMPORTANT REASON IS ADVANCED BY PETITIONER FOR THE GRANTING OF ITS PETITION. CLEARLY, NO RULE 17 REASONS APPEAR IN SUPPORT OF ITS PETITION.

Petitioner cannot point with truth at any reason even approaching in character those set forth in Rule 17 for the granting of its application. The language of the statutes is clear and Congress has very recently spoken (*Public Law 96-420, supra*), clearly indicating that its intent was and is consistent with the holding of the Court of Appeals.

IV.

PETITIONER SHOULD NOT BE ALLOWED TO SEEK THE SANCTIONING BY THIS COURT OF LAND TRANSFERS MADE IN VIOLATION OF FEDERAL LAW.

In contending that civil actions such as this one would disturb old land transactions and therefore should not be allowed, Petitioner asks this Court to approve violations of Federal law which is and has been in existence since 1790 in that:

(a) The land transactions which Petitioner seeks to protect were illegal and made in violation of the land transaction section of the Trade and Intercourse Acts (now 25 U.S.C. § 177) because not made with Federal consent or approval;

(b) The land transfer section of the Trade and Intercourse Acts, had it been complied with (land transfers from Indians legal only if with consent of the United States), would have given certainty to land titles; it is the *violation* of the Acts which has given rise to this action; and

(c) An unbroken line of this Court's decisions construing legislation for the protection of Indians in very liberal fashion, as an expression of clear federal policy, ought not to be deviated from now. *Wilson* v. *Omaha Indian Tribe,* 99 S. Ct. 2529, 2537 (1979); *Bryan* v. *Itasca County,* 426 U.S. 373, 329 (1976); *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 79 (1918).

CONCLUSION

For the reasons stated above, Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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ALEXANDER L. STEVAS
CLERK

No. 80-1365

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT, PETITIONER

vs.

MOHEGAN TRIBE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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STATE OF CONNECTICUT, PETITIONER

vs.

MOHEGAN TRIBE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

REASON FOR FILING REPLY

Pursuant to Rule 22(5) of the United States Supreme Court Rules, Petitioner respectfully files this Reply Brief. The Rules would indicate that the Reply Brief should answer the brief of a party, but, because Respondent's Brief was so vague and failed to address the issues raised, it would have served no purpose to answer it. However, the Solicitor General, as Amicus, has addressed some issues already raised plus a new one. It would be manifestly unjust to Petitioner not to allow it to address these arguments.

ARGUMENT

I

CONGRESSIONAL HISTORY INDICATES LEGISLATIVE INTENTION TO CONFINE THE WHOLE ACT TO INDIAN COUNTRY.

Amicus argues that nothing in the Acts suggest they were inapplicable to lands in the original thirteen states, land that lay outside Indian Country. (Amicus Brief, page 14).

Petitioner has pointed out in its Brief that the Act, read as a whole, suggests otherwise. The rather sketchy history of the various Acts also suggests that Congress intended these Acts to apply only in Indian Country.

For example, Representative Everett, reporting for the Committee on Indian Affairs, on May 20, 1834, discussed three bills before that Committee, one of these bills was the regulation of trade and intercourse.

In the report he stated "The Indian Country to which the bills reportedly refer...."[1], an apparently all inclusive statement. Representative Everett does not say "The Indian Country to which some sections of these bills reportedly refer...," nor does he use any other language indicating any intention by Congress to apply certain provisions of the Act outside of Indian Country. Mr. Everett, an orator of note, and certainly a man with considerable knowledge of the English language, must be presumed to have intended what he said.

---

[1]House Report No. 474, 23rd Congress, 1st Session, Vol. 263, Page 1.

II

EXCEPT FOR THE ACT OF 1790, CONGRESS NEVER INTENDED THE ALIENATION OF LAND SECTION TO APPLY TO STATES HAVING THE RIGHT OF PREEMPTION.

In Section 4 of the Act of 1790, Congress specifically excluded sales "to any state, whether having the right to preemption to such lands or not...," and it is an undisputed fact that only the thirteen original states had rights of preemption in Indian land.

In the Alienation of Land Sections from 1793 on, this language was specifically deleted, and instead, Congress inserted the following proviso:

> "Provided nevertheless, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty."[2]

When Congress makes such a radical change in language such as this, it must be presumed that something very different was intended.

Unfortunately, Petitioner can find no legislative history for this change. However, the most reasonable explanation is that Congress, after 1793, only meant to apply this proviso in Indian Country. The elimination of the language concerning preemption indicates this. Also the presence of commissioners suggests its application only in Indian Country because the commis-

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[2]Act of 1793, Ch. 19, 1 Stat. 329.

sioners chosen to make treaties were either Indian superintendents, territorial governors or generals on the frontier, all persons who were in Indian Country. Petitioner can find no treaty ever made between the United States and an Indian tribe outside Indian Country as that term was defined in the Northwest Ordinance under the Articles of Confederation or in the Indian Trade and Intercourse Acts.

The Court of Appeals fell into the same error in its example to bolster its argument that some sections of the Act were confined to Indian Country and some were not. The Court picked as an example of universal, geographical application Section 9 of the 1793 Act. This Section empowered the President to appoint temporary agents to reside among the Indians. No agent, temporary or otherwise, ever resided with Indian tribes outside of Indian Country. In fact, no Indian department ever lay territorily outside of Indian Country.

If one looks at the organization of the Indian Department in 1802, 1818 or 1834 (See House Report No. 474, pages 42 through 48), it is obvious no superintendent, agent or subagent, was ever stationed outside Indian Country. Because of this, the analysis of the Court of Appeals loses much credibility.

III

THE CONSTITUTIONAL ARGUMENT OF AMICUS IS NOT WELL TAKEN.

For the first time in this civil action, Amicus has raised the Constitutional question, stating that the Respondent might prevail on a Constitutional question, and, therefore, this Petitioner is premature (Amicus Brief, pages 4 through 7).

Petitioner has found no case which has ever held that state transactions with Indians were ever unconstitutional nor can it find anything in the literature to support that argument of Amicus.

The fact that Congress has plenary power under the Commerce Clause does not mean the states are constitutionally excluded,[3] and this is particularly true where Congress chooses not to act.

Respectfully submitted,

by: /s/Francis J. MacGregor
Francis J. McGregor
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CERTIFICATION

This is to certify that on the 21st day of May, 1981, a copy of Petitioner's Reply Brief was mailed to all counsel of record and Amicus.

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[3]See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and *Parden* v. *Terminal Railway*, 377 U.S. 186 (1964).

MAR 23 1981
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No. 80-1365.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

STATE OF CONNECTICUT,
PETITIONER,

v.

MOHEGAN TRIBE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief Amici Curiae Of The State of South Carolina, Et Al In Support Of Petitioner

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of Amici Curiae in Support.

Statement of Interest of Amici Curiae.

This brief *amici curiae* is submitted by the State of South Carolina and Lancaster County, York County, the City of Rock Hill and the Town of Fort Mill in the State of South Carolina, and the County of Seneca in the State of New York.[1]

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[1] In accordance with Sup. Ct. R. 36.4, for the purpose of filing this brief, the State of South Carolina is sponsored by its Attorney General, Daniel R. McLeod; Lancaster County is sponsored by its county attorney, Phillip Wright; York County is sponsored by its county attorney, John M. Spratt, Jr.,; the City of Rock Hill is sponsored by its city attorney, Charles W. F. Spencer, Jr.; the Town of Fort Mill is sponsored by its town attorney, B.

The South Carolina *amici* are defendants in an action commenced by the alleged Catawba Indian Tribe of South Carolina.[2] The claims of the Catawba Indians involve title to 144,000 acres of real property in the State of South Carolina and damage claims of an unspecified amount. The County of Seneca in the State of New York is defendant in an action commenced by the alleged Cayuga Indian Nation of New York.[3] The pending and threatened claims of the Cayuga Indians total approximately three million acres of land in the State of New York and include damage claims of hundreds of millions of dollars.

The actions commenced by the Cayuga Indians and the Catawba Indians are predicated upon claimed violations of those provisions of the various Indian Trade and Intercourse Acts regulating transfers of Indian lands ("the Nonintercourse statute").[4] The applicability of these and related provisions of the Trade and Intercourse Acts to Indians claiming land in the eastern United States was the primary issue decided in this case by the Court of Appeals for the Second Circuit. Because

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Bayles Mack; and Seneca County is sponsored by its county attorney, John M. Sipos.

[2] *Catawba Indian Tribe of South Carolina* v. *State of South Carolina*, Civil Action No. 80-2050-6 (D.S.C., filed October 28, 1980).

[3] *Cayuga Indian Nation of New York* v. *Carey*, Civil Action No. 80-CV-930 (N.D.N.Y., filed October 29, 1980) (one action pending, one action threatened). In this action, the Cayuga Indians assert a claim to approximately 62,000 acres of land in Seneca and Cayuga Counties in the State of New York. The Cayuga Indians also have stated that they plan to file suit claiming an additional 3,000,000 acres of land.

[4] These provisions regulating the alienation of Indian land, presently codified at 25 U.S.C.A. § 177 (1963), and referred to by the Court of Appeals as the "Nonintercourse statute," always were enacted as part of the more comprehensive Indian Trade and Intercourse Acts. (*Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*, filed on behalf of the State of Connecticut ("App."), at 7a-11a.) The term "Nonintercourse statute" as used by the Court of Appeals referred only to those sections of the various versions of the Indian Trade and Intercourse Acts regulating the alienation of Indian land. The Nonintercourse statute

the issues decided by the Court of Appeals may be dispositive of the claims of the Cayuga and Catawba Indians, the South Carolina and New York *amici* submit this brief in support of the State of Connecticut's petition for a writ of certiorari.

Summary of Argument.

This case presents for review two issues potentially dispositive of Indian claims to millions of acres of land in the eastern United States. These issues are, first, whether the Nonintercourse statute was intended to apply only to land in "Indian country," as defined in the various Indian Trade and Intercourse Acts and, second, whether the "surrounded by settlements" exception in those Acts was intended to apply to transfers of land. The United States Court of Appeals for the Second Circuit held that the Nonintercourse statute applies to Indian land throughout the United States, and that the "surrounded by settlements" exception does not apply to land transfers.

The Court of Appeals' unprecedented holdings make vulnerable to Indian claims millions of acres of land in the eastern United States. Within the past ten years, law suits concerning title to lands in the eastern United States have been commenced by at least twelve groups of Indians in six states. Many of these suits are still pending and more have been threatened. The issues of the geographic applicability of the Nonintercourse statute and the transactional applicability of the "surrounded by settlements" exception should dispositive of all these pending and threatened claims.

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was first adopted on July 22, 1790. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138. It was subsequently reenacted by: Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730; Rev. Stat. § 2116. (*See* App. C.)

In addition, the Court of Appeals' holding that the Nonintercourse statute applies to all Indian lands throughout the United States conflicts with prior decisions of this Court. This Court recently has held that the 1834 Trade and Intercourse Act was intended to apply only to "Indian country." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). This Court reached the identical conclusion in *Bates* v. *Clark*, 95 U.S. 471, 5 Otto 204 (1877), and in *American Fur Co.* v. *United States*, 27 U.S. 450, 454, 2 Pet. 358, 369 (1829) (construing the 1802 Trade and Intercourse Act).

It also is clear from the legislative history and the language of the various Trade and Intercourse Acts that Congress did not intend the Nonintercourse statute to apply outside "Indian country." These Acts were enacted in an effort to regulate relations with those Indian tribes on the western frontier in order to assure peace and security in that volatile territory. At the same time, Congress chose to leave to the states the regulation of relations with Indians within their borders and subject to their jurisdiction.

Congress also intended that the "surrounded by settlements" exception apply to transfers of land. This intent is clear from the language and structure of the Trade and Intercourse Acts. This construction draws further support from the decision of *United States* v. *Holliday*, 70 U.S. 182, 3 Wall. 407 (1866), in which this Court equated "trade or intercourse" with "commerce," thus giving the exception an expansive interpretation which would encompass transfers of land.

The extensive recurrence of the issues decided by the Court of Appeals and the conflict between the decision of the Court of Appeals and the prior decisions of this Court require a definitive restatement of the governing law to assure correct and uniform results in all pending and future Indian claims to land in the eastern United States.

Reasons for Granting the Writ.

I. The Issues Involved are of Major Public Importance and Affect Claims to Millions of Acres of Land in South Carolina, New York and Other States.

The narrow issue decided by the United States Court of Appeals for the Second Circuit was whether the Nonintercourse statute was applicable to the lands in the State of Connecticut claimed by the appellee, the alleged Mohegan Tribe. As the Court of Appeals readily acknowledged, however, the broader issue before it concerned the applicability of the Nonintercourse statute to Indians and tribes of Indians located to the east of the "Indian country" delineated by those Acts. (App. 3a.) The import of the decision below thus extends far beyond the claims asserted by the appellee.

Groups of Indians in other eastern states recently have asserted numerous land claims predicated upon alleged violations of the Nonintercourse statute. These groups of Indians include the Cayuga Indians (New York);[5] the Oneida Indians (New York);[6] the Catawba Indians (South Carolina);[7] the Passamaquoddy and Penobscot Indians (Maine);[8] the Maliseet Indians (Maine); the Mashpee Indians (Massachusetts);[9] the Chappaquiddick Indians (Massachusetts);[10] the Narragansett

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[5] *See* n.3, *supra*.

[6] *Oneida Indian Nation of New York* v. *State of New York*, Civil Actions Nos. 78-CV-104, 79-CV-798 (N.D.N.Y., filed respectively in 1978 and on December 3, 1979) (pending claims to approximately 5,000,000-6,000,000 acres of land).

[7] *See* n.2, *supra*.

[8] *United States* v. *State of Maine*, Civil Actions Nos. 1966-ND and 1969-ND (D. Me., filed June 29, 1972 and July 14, 1972) (resolved legislatively).

[9] *Mashpee Tribe* v. *Town of Mashpee*, 447 F.Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (action dismissed after jury trial).

[10] *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979) (affirming dismissal of claims by individual Indians).

Indians (Rhode Island);[11] the Western Pequot Indians (Connecticut);[12] the Schaghticoke Indians (Connecticut);[13] and the Gay Head Wampanoag Indians (Massachusetts).[14] Each of these claimants[15] seeks the return of vast amounts of real property and monetary damages for prior transfers allegedly violative of the Nonintercourse statute. Although the history of each of these groups varies, each may have been subject to the ordinary jurisdiction of a state since at least 1789, and each may claim land to the east of the "Indian country" borderline defined by the various Trade and Intercourse Acts. Consequently, the issue of the geographic applicability of the Trade and Intercourse Acts may be dispositive of these claims.

In the State of New York alone, the land claims of the Cayuga and Oneida Indians[16] involve 9,000,000 acres of

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[11] *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976) (resolved legislatively; 25 U.S.C.A. § 1701 *et seq.* (1979 Supp.)).

[12] *Western Pequot Tribe of Indians* v. *Holdrige Enterprises, Inc.*, Civil No. H-76-193 (D. Conn., filed Mar. 27, 1977) (pending).

[13] *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976) (denial of defendant's motion to amend answer to add defenses of laches, adverse possession, statute of limitations and state market title statute; granting of motion to amend answer to add defenses of waiver and estoppel) (pending).

[14] *Wampanoag Tribe of Gay Head* v. *Town of Gay Head*, Civil No. 74-5826-G (D. Mass., filed Nov. 28, 1974) (pending).

[15] In 1980, Congress extended the applicable statute of limitations for the commencement of Indian damage claims by the United States to December 31, 1982, thus keeping courtroom doors open to new claimants. Pub. L. No. 96-217, § 1, 94 Stat. 126 (1980) (codified at 28 U.S.C. § 2415(a)). In connection with this legislation, the Department of Interior reported that it now is processing some 9,768 Indian claims and stated that more than 5,000 additional, identifiable claims may not yet have been inventoried. S. Rep. No. 96-569, 96th Cong., 2d Sess. 8 (1980) (Pub. L. No. 96-217). Undoubtedly many of these claims may arise in situations where the Nonintercourse statute would be applicable.

[16] The importance of the Court of Appeals' decision to the Cayuga and Oneida Indians is best evidenced by the Motion to Modify Decision which they filed with that Court.

public and private lands and hundreds of millions of dollars. Similarly, the claims of the Catawba Indians involve title to 144,000 acres of real property in South Carolina and damage claims of an unspecified amount. Thus, the issues decided by the Court of Appeals are clearly not sporadic; rather, the issues have arisen and will continue to arise in litigation, pending and threatened, throughout the eastern United States. The peculiar gravity and general importance of these questions justify the granting of certiorari.

II. The Decision of the United States Court of Appeals for the Second Circuit Conflicts with Prior Decisions of this Court.

The decision below conflicts with this Court's recent decision concerning the geographic applicability of the 1834 Trade and Intercourse Act. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). In *Wilson*, the Omaha Indian Tribe claimed, as part of its reservation, a tract of land on the bank of the Missouri River. The defendants, including the State of Iowa and several individuals, contended that past movements of the Missouri River had "washed away part of the reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian land owners." 442 U.S. at 657. One of the two principal issues before the Court was the proper allocation of the burden of proof in this quiet title action. Resolution of this issue required interpretation of section 22 of the 1834 Trade and Intercourse Act, now codified at 25 U.S.C.A. § 194 (1963), which provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession of ownership.

The Court specifically was required to determine whether the "white persons" to whom section 22 shifted the burden of proof in title litigation with Indians included the "sovereign States of the Union," such as the defendant State of Iowa. 442 U.S. at 667.

Writing for the Court, Justice White first carefully analyzed the purpose of the 1834 Trade and Intercourse Act in its entirety, and section 22 in particular:

> The provision first appeared in slightly different form in 1822, Act of May 6, 1822, 3 Stat. 683, as part of an Act amending the 1802 Indian Trade and Intercourse Act, Act of Mar. 30, 1802, 2 Stat. 139, which was one of a series of Acts originating in 1790 and designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians. Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions. The 1822 provision was part of this design; and with only slight change in wording, it was incorporated in the 1834 consolidation of the various statutes dealing with Indian affairs. Act of June 30, 1834, 4 Stat. 729.

442 U.S. at 664-65 (footnote omitted).

Justice White then considered and reviewed the precise statutory language chosen by Congress to effect this purpose:

> [I]n terms of the purpose of the provision — that of preventing and providing remedies against non-Indian squatters on Indian lands — it is doubtful that Congress anticipated such threats from the States themselves or in-

> tended to handicap the States so as to offset the likelihood of unfair advantage. Indeed, *the 1834 Act, which included § 22, the provision identical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section."* H.R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished. . . ." 4 Stat. 729. Although this definition was discarded in the Revised Statutes, see Rev. Stat. § 5596, *it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.*

442 U.S. at 667-68 (emphasis added).

Having construed section 22 to be applicable only within Indian country and only to disputes not involving any of the states, Justice White concluded that Congress could not have intended the phrase "white person" to include any of the states. *Id.* In so holding, the Court, by implication, confirmed that all the provisions of the various versions of the Trade and Intercourse Acts were intended to apply only in Indian country. The conclusion of the Court of Appeals in this case that the coverage of those Acts extends to all Indian tribes wherever located thus is in direct and irreconcilable conflict with *Wilson*.

Shortly after *Wilson* was decided, the Solicitor General filed a Motion for Modification of Opinion.[17] Specifically, the Solicitor General sought deletion of that portion of the opinion

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[17] The Solicitor General's Motion for Modification of Opinion is set forth in full as Appendix A of this Brief.

in which the Court discussed "the geographic applicability of the Nonintercourse Act of 1834" on the grounds that this "language . . . may well be seemed dispositive of a number of pending eastern land claim cases . . .."[18] In support of his Motion, the Solicitor General argued that: (1) section 22, in contrast to other sections of the 1834 Trade and Intercourse Act which were expressly made applicable only in Indian country, made no reference to Indian country and therefore was without geographic limitation; and (2) resolution of the geographic applicability of section 22 was not essential to determination of *Wilson* and consequently that portion of *Wilson* discussing the limited applicability of the Trade and Intercourse Acts could be deleted without affecting the result in *Wilson*. On October 2, 1979, this Court denied the Solicitor General's Motion for Modification. *Wilson* v. *Omaha Indian Tribe*, 444 U.S. 817 (1979).

The *Wilson* interpretation of the geographic scope of the Trade and Intercourse Acts[19] has particular application in this

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[18] Among the claims enumerated by the Solicitor General were those of the Catawba Indians of South Carolina and the Cayuga Indians of New York.

[19] As the Court of Appeals correctly recognized (App. 25a), this Court's decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), does not dictate a different result. In *Oneida*, the narrow issue was whether a claim of right to possession of land based upon the Nonintercourse statute stated a "federal controversy within the jurisdiction of the District Court . . .." 414 U.S. at 666. In holding that such a claim stated a federal question, the Court noted that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." 414 U.S. at 670 (*dictum*). Thus, the Court of Appeals stated that "it would be consistent with *Oneida* to hold, as the State argues, that land transfers in Indian country were to be governed by the statute, but that the exclusion of eastern lands from the Nonintercourse statute meant that the 'federal law' as to those lands was to allow the states to purchase them." (App. 25a.) *Oneida* thus left undecided the issue eventually resolved by *Wilson*.

Moreover, assuming *arguendo* that *Oneida* can be read to construe the Trade and Intercourse Acts to apply within the original thirteen states, *Oneida* and *Wilson* are easily harmonized. Certain portions of the "Indian country" boundary passed through some of the original thirteen states. At

case for two reasons. First, in affirming the District Court's denial of the Motion to Dismiss, the Court of Appeals stated that "the language of the Nonintercourse statute makes its dictates applicable to Indian land located anywhere in the United States" and that "Congress was quite explicit when it needed to refer either to Indian country or to the Indian boundary." (App. 11a, 13a.) This precise argument, however, was implicitly rejected in *Wilson* and also was rejected by the Court when asserted by the Solicitor General in his Motion for Modification. Although the provision of the Trade and Intercourse Act at issue in *Wilson* was not, by its express terms, confined to Indian country, the Court nevertheless held that provision to be of limited geographic applicability. The analysis of the purpose of the Trade and Intercourse Acts, which led the Court to conclude that in enacting the Trade and Intercourse Acts, Congress had in mind only disputes arising in Indian country, requires that the Nonintercourse statute also be held to apply only to Indian country.

Second, section 29 of the 1834 Trade and Intercourse Act repealed the 1802 Indian Trade and Intercourse Act except for Indian tribes residing east of the Mississippi River. Act of June 30, 1834, ch. 161, § 29, 4 Stat. 729. As to those eastern Indian tribes, the 1802 Indian Trade and Intercourse Act remained effective. The final provision of section 1 of the 1802 Act demonstrates, however, that "all the provisions contained in [the 1802] act" were limited in application to "Indian country" as defined therein. Thus, the version of the Trade and Intercourse Act which applies in this case expressly confined the applicability of its provisions to "Indian country."

This limitation in coverage, which the Court of Appeals rejected, was confirmed by this Court in *American Fur Co.*

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various times, portions of New York, Pennsylvania, North Carolina and Georgia were located within "Indian country." Thus, the Trade and Intercourse Acts applied to the original thirteen states to the extent that those states were located within "Indian country."

v. *United States*, 27 U.S. 450, 454, 2 Pet. 358, 369 (1829). In *American Fur*, a licensed Indian trader was accused of carrying ardent spirits into Indian country for the purpose of sale or distribution in violation of the 1802 Trade and Intercourse Act, as amended by the Act of May 6, 1822, ch. 58, 3 Stat. 682. The Court, in considering the trial court's instruction to the jury on the propriety of the seizure of the trader's goods "'in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes'" 27 U.S. at 454, 2 Pet. at 367, held that all provisions of the 1802 Trade and Intercourse Act were applicable only in Indian country:

> If we have rightly interpreted this part of the instruction, we feel no hesitation in saying, that we cannot accede to the corrctness [*sic*] of the instruction thus qualified, since it would subject to seizure and forfeiture all the goods of the trader carried into a country, not only belonging to the United States, but *lying without the boundaries of the Indian country, as they are described by the 1st section of the Act of 1802; to which all the provisions contained in that Act, and consequently those contained in the amendatory Act of 1822, are by that section expre y confined.* If the country referred to in this instruction was purchased of the Indians subsequent to the 30th of March, 1802 so as that the boundary line thereby became varied; then the above section declares that all the provisions of that Act shall be construed to apply to the boundary line so to be varied, in the same manner as they apply by force of that Act to the boundary line therein recited.
>
> If we misunderstand the meaning of this instruction, it is so probable that it might have been misunderstood by the jury, that justice demands a re-trial of the cause.

27 U.S. at 454, 2 Pet. at 369 (emphasis added).

The Supreme Court reached the same conclusion in *Bates* v. *Clark*, 95 U.S. 471, 5 Otto 204 (1877). The *Bates* plaintiffs claimed that the defendants, two officers of the United States Army, had committed a trespass by seizing the plaintiffs' whiskey. The defendants asserted that the seizure had taken place in Indian country and therefore was justified by section 20 of the 1834 Trade and Intercourse Act (forbidding the introduction of wines and spiritous liquors into Indian country). Construing the 1834 Trade and Intercourse Act, Justice Miller held that the Act "is a very long and important Act [which] begins by describing in its first section the country or territory in which that Act shall be operative." 95 U.S. at 471, 5 Otto at 205.

These conflicts between the decision of the court below and the decisions of this Court warrant the granting of certiorari.

III. The Court of Appeals Incorrectly Interpreted the Applicability of the Trade and Intercourse Acts.

A. *Congress Did Not Intend that the Trade and Intercourse Acts Apply Outside "Indian Country."*

The power of Congress to regulate trade and intercourse with "the Indian Tribes" is expressly provided in the Constitution. U.S. Const. art. I, § 8, cl. 3. That power was exercised promptly in the second session of the First Congress by passage of "An act to regulate trade and intercourse with the Indian tribes." Act of July 22, 1790, ch. 33, 1 Stat. 137 *et seq.* When the Act and its successor Acts expired, they were replaced by similar Acts regulating relations with the Indian tribes.[20] In 1802, Congress enacted another version of the Trade and Intercourse Act which did not contain any limitation on the time

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[20] Act of March 1, 1793, ch. 19, 1 Stat. 329 *et seq.*; Act of May 19, 1796, ch. 30, 1 Stat. 469 *et seq.*; Act of March 3, 1799, ch. 46, 1 Stat. 743 *et seq.*

of its effect. The 1802 Trade and Intercourse Act was amended and supplemented in 1816,[21] 1817,[22] and 1822;[23] and in 1834, Congress passed the 1834 Trade and Intercourse Act. Certain provisions of the 1834 Trade and Intercourse Act remain positive law and are codified in 25 U.S.C. *passim*.

Read together, these acts evidence a single, continuing effort to regulate relations only with those Indian tribes on the western frontier. *See generally*, Paterson and Roseman, *A Reexamination of Passamaquoddy* v. *Morton*, 31 Me. L. Rev. 115 (1979). In their respective first sections, the 1796, 1799 and 1802 Trade and Intercourse Acts each contained a definition of the "Indian country" boundary line to which all the provisions of the Acts were to apply. (App. 61a-62a, 71a-72a, 74a-75a.) This defined "Indian country" line followed the boundaries of the lands reserved to the several Indian tribes by treaty and was expressly subject to alteration by later treaty. *See Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*, filed on behalf of the State of Connecticut, ("Petition for Cert."), at 5-6. In the event of such alteration, these Acts provided that:

> then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

1796 Trade and Intercourse Act, § 1; 1799 Trade and Intercourse Act, § 1; 1802 Trade and Intercourse Act, § 1.

This limitation on the geographic applicability of the Trade and Intercourse Acts derived directly from concern with de-

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[21] Act of April 29, 1816, ch. 165, 3 Stat. 332.

[22] Act of March 3, 1817, ch. 92, 3 Stat. 383.

[23] Act of May 6, 1822, ch. 58, 3 Stat. 682.

fense and security of the western frontier. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978) (purpose of 1790 Trade and Intercourse Act "to prevent destructive retaliations by the Indians"). *See generally*, Paterson and Roseman, *supra*, 31 Me. L. Rev. at 121-25. The initial regulation of Indian affairs resulted from the appeals of President Washington and Secretary of War, Henry Knox, to Congress. *See* Petition for Cert. at 10-13. Both of these men viewed the antagonism of the powerful Indian tribes on the frontier occasioned by sharp dealing traders and speculators as the mischief to be prevented. The alternative of armed action against the Indian tribes on the frontier to force those Indian tribes west of the Mississippi was considered briefly by Secretary of War Knox and President Washington, but rejected as impractical and dishonorable. *Report from H. Knox, Secretary of War, to the President of the United States Relative to Northwest Indians*, June 15, 1789, *American State Papers* (Indian Affairs, vol. I, 1832), pp. 12-13 (Washington; Gales and Seaton, 1832). Congress consequently decided to pursue security on the frontier through the Trade and Intercourse Acts rather than through war. *See generally*, F.P. Prucha, *American Indian Policy In the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*, at 44-49 (1962).

The express language of the Trade and Intercourse Acts, as amplified by the purpose underlying those Acts, clearly evidenced the intent of Congress to limit the regulation of Indian tribes to that area known as "Indian country"[24] in the same manner as its predecessor, the Continental Congress, had. F.P. Prucha, *supra*, at 45, 52 (the 1790 Trade and Intercourse Act "continued the pattern set in the Ordinance of 1786 and earlier colonial legislation"). *See* Paterson, and Roseman,

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[24] The intent of Congress to so limit regulation of Indian tribes also is expressed in a number of other statutes and treaties. *See, e.g.*, Act of May 28, 1830, 4 Stat. 411; Treaty with the Cherokee Nation, July 8, 1817, 7 Stat. 156.

supra, 31 Me. L. Rev. at 125-130.[25] These Acts exhibit a constant effort to regulate relations with those Indian tribes residing in Indian country and protected in their lands by treaty. Equally evident was Congress' intention to refrain from regulating relations with those Indians and tribes of Indians who were under the jurisdiction of the several states.[26] Because the Court of Appeals failed to recognize Congress' intent and the resultant express geographic limitations embodied in the Trade and Intercourse Acts, it incorrectly decided that the Nonintercourse statute applied outside Indian country.

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[25] The Court of Appeals theorized that the Congress may have intended to regulate Indian affairs more extensively than had the Continental Congress. (App. 20a.) This unsupported hypothesis is contradicted by Justice Baldwin's statement in *Cherokee Nation* v. *State of Georgia*, 30 U.S. 25, 41, 5 Pet. 1, 45 (1831):

> The legislation of Congress under the constitution in relation to the Indians has been in the same spirit and guided by the same principles, which prevailed in the old Congress and under the old confederation. . . .
>
> In 1802 Congress passed the Act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations . . ..

Justice Baldwin's statement concerning "continuity of Indian policy" has been confirmed by a number of leading commentators. R. Horsman, *Expansion and American Indian Policy 1783-1812*, at 62 (1967); G. Harmon, *Sixty Years of Indian Affairs, Political, Economic and Diplomatic 1789-1850*, at 18-19 (1960 Reprint).

[26] This limitation on applicability of the Nonintercourse statute also is evidenced by contemporaneous administrative actions. For example, in his 1830 report to Congress, Commissioner of Indian Affairs Hamilton recommended a change in the Indian boundary line delineated by the 1802 Trade and Intercourse Act:

> It is believed that the line defined by the Act of 1802 as the Indian boundary and *to which its provisions were intended particularly to apply*, has long since ceased to be so.

1 W. Washburn, *The American Indian and the United States: A Documentary History*, at 16-17 (1973) (emphasis added).

B. *Congress Intended that the "Surrounded by Settlements" Exception Apply to Transfers of Land.*

In holding that the "surrounded by settlements" exception of the various Trade and Intercourse Acts did not apply to land transactions, the Court of Appeals relied upon the location of the exception in the 1790 Act. Section 1 of that Act provided that "no person should be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose." (App. 53a.) A proviso at the end of section 1 then stated that "the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper." (*Id.*) Because the sale of lands was specifically mentioned only in section 4 of the 1790 Act, which contained no similar proviso, the Court of Appeals reasoned that the "surrounded by settlements" exception had no applicability to land transactions. (App. 29a.)

A careful reading of the Trade and Intercourse Acts refutes the Court of Appeals' analysis. In 1793,[27] what was once a proviso to section 1 of the 1790 Act was moved to a separate section near the end of the Act. Section 13 of the 1793 Act provided:

> *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with In-

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[27] The "surrounded by settlements" exception was contained in section 13 of the 1793 Act and section 19 of the 1796, 1799 and 1802 Acts. (App. 60a, 70a, 73a, 78a.) The exception was removed from the Act in 1834. The savings clause contained in section 29 of the 1834 Act, however, left the 1802 Act intact insofar as it applied to Indian tribes residing east of the Mississippi River. (App. 89a-90a.) As a result, the "surrounded by settlements" exception, which by its terms applied only within the jurisdiction of the states, remained in effect until the savings clause was dropped in 1873. U.S. Rev. Stat., tit. XXVIII, ch. 3, § 2116 (1873). *See* Note, *Land Claims Under the Indian Trade and Intercourse Acts: The White Settlement Exception Defense*, 60 B.U.L. Rev. 911, 912 (1980).

> dians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Similar provisions were contained in section 19 of the 1796, 1799 and 1802 Acts.

The removal of the exception from the licensure provisions of section 1 to a separate section contraverts the reasoning of the Court of Appeals. The proviso contained in section 1 of the 1790 Act provided for Presidential discretion for the sole purpose of exempting surrounded tribes from the licensure requirements of that section. The exception contained in the later Acts made no reference to licenses. Rather, the exception provided that "nothing in this act shall be construed to prevent any trade or intercourse with Indians" covered by the exception. It thus is clear from the language and location of the 1793 proviso that Congress intended a broad expansion of the "surrounded by settlements" exception, and was determined to exempt the surrounded Indians from "any" restrictions on trade and intercourse.[28] The only relevant question, therefore, is whether land transactions fall within the ambit of "trade or intercourse" as used in the exception.

Webster's New World Dictionary of the American Language (Concise Edition 1960) defines trade as "buying and selling; commerce." The same dictionary defines intercourse as "communication or dealings between or among people, countries, etc.; interchange of products, services, ideas, etc." It is difficult to imagine broader terms than these for describ-

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[28] The Court of Appeals attempted to discard this problem by reasoning that the change in the 1793 Act was intended merely to withdraw the matter from Presidential discretion and make it mandatory. (App. 28a.) If that were Congress' intent, however, it could have been accomplished by the less drastic measure of retaining the proviso in section 1 and altering the language.

ing dealings between Indians and United States citizens. To hold that the purchase and sale of land is not "commerce" or "dealings between or among people" is to ignore the plain meaning of the language used.

This Court itself has equated trade and intercourse as used in these Acts with "commerce" as used in the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. In *United States* v. *Holliday*, 70 U.S. 182, 3 Wall. 407 (1866), this Court was asked to determine whether the Act exceeded the federal government's power under the Commerce Clause. This Court held:

> The Act in question, although it may partake of some of the qualities of those Acts passed by State Legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be called a regulation of commerce. . . . '[C]ommerce undoubtedly is traffic, but it is something more; it is intercourse.' The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce; and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

70 U.S. at 185, 3 Wall. at 410. By equating "commerce" with "trade or intercourse," the Court gave the Act's language an expansive interpretation. There is no doubt that the commerce power of the Constitution extends to transactions in land.[29] After *Holliday*, neither can there be any doubt that the phrase "trade or intercourse" as used in the Trade and In-

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[29] Indeed, if the transfer of land is not "commerce," Congress' power to regulate "commerce" with the Indian tribes, U.S. Const. art. I, § 8, cl. 3, would not permit the enactment of the prohibitions embodied in the Nonintercourse statute.

tercourse Act encompasses the sale of land.[30] *See* Note, *Land Claims Under the Indian Trade and Intercourse Acts: The White Settlement Exception Defense*, 60 B.U.L. Rev. 911, 925 n.103 (1980).

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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[30] To be sure, the Indian Trade and Intercourse Acts each contained a separate section prohibiting the purchase of Indian land without federal authorization. That land, more valuable to the Indians than a peddler's merchandise, required special protection under the Acts does not mean that transfers of such land are not "trade or intercourse" covered by the "surrounded by settlements" exception. For example, section 6 of the 1793 Act sets forth special requirements for the purchase of Indians' horses, another especially important item to the Indians. (App. 57a.) The logical extension of the Court of Appeals' reasoning would exclude horse sales from the definition of "trade or intercourse." Under the plain meaning of the language used, however, it cannot be disputed that a person purchasing a horse from an Indian is engaged in "trade or intercourse" with the seller. The same holds true for land sales.

APPENDIX

Appendix A.

Nos. 78-160 and 78-161

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY TIBBALS WILSON, ET AL., PETITIONERS,

v.

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA.

STATE OF IOWA, ET AL., PETITIONERS,

v.

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA.

Motion for Modification of Opinion.

WADE H. MCCREE, JR.
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, ET AL., PETITIONERS,

v.

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA.

No. 78-161

STATE OF IOWA, ET AL., PETITIONERS,

v.

OMAHA INDIAN TRIBE AND
THE UNITED STATES OF AMERICA.

Motion for Modification of Opinion.

The Solicitor General on behalf of the United States, respectfully moves for modification of the opinion in this case, announced on June 20, 1979.[1]

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[1] Such modification of an opinion without granting rehearing is, of course, not unfamiliar practice in this Court. See, e.g., *SEC* v. *Drexel & Co.* 349

1. On page 12 of the slip opinion the Court discusses the geographic applicability of the Nonintercourse Act of 1834, ch. 161, 4 Stat. 729, in language that may well be deemed dispositive of a number of pending eastern land claim cases[2] (as well as additional claims that have been asserted but not yet made the subject of litigation).[3] The question was not explored in the courts below, nor was it briefed or argued here. Since its resolution was not essential to the decision of the case, this Court may not have had occasion fully to consider the complexity of the issue. In these circumstances, the Court may deem it appropriate to withdraw the portions of the opinion discussing the geographic scope of the 1834 Act, so that the question may be left open for consideration in the lower courts and, if necessary, resolved by this Court after full briefing and argument.

2. The matter is not as straightforward as might at first appear. As this Court noted (slip op. 12), Section 1 of the Act de-

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U.S. 910, 913 (1955); *Slochower* v. *Board of Higher Education*, 351 U.S. 944 (1956); *Swenson* v. *Sridham*, 410 U.S. 904 (1973); *City of Virginia Beach* v. *Howell*, 411 U.S. 922 (1973).

[2] E.g., *Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977), aff'd, 592 F.2d 575 (1st Cir. 1979); *United States* v. *Maine*, Civil Nos. 1966-ND and 1969-ND (D. Me.); *Oneida Indian Nation of New York* v. *Williams*, Civil No. 74-CV-167 (N.D. N.Y); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527 (N.D. N.Y. 1977) (holding conveyance to State in 1795 violated Nonintercourse Act of 1790, ch. 33, 1 Stat. 137, and is therefore of no validity); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976) (denial of defendant's motion to amend answer to add defenses of laches, adverse possession, statute of limitations, and state market title statute; grant of motion to amend to add defense of waiver and estoppel); *Mohegan Tribe* v. *Connecticut*, Civil No. H-77-434 (D. Conn.); *Western Pequot Tribe of Indians* v. *Holdridge Enterprises, Inc.*, Civil No. H-76-193 (D. Conn.).

[3] For example, settlement negotiations are now taking place with regard to claims involving the Catawba Indian Tribe of South Carolina, the Gay Head Wampanoag Band in Massachusetts, and the St. Regis-Mohawk, and Cayuga claims in New York.

fines Indian country to include certain areas west of the Mississippi, and also "that part of the United States east of the Mississippi river, and not within any state to which Indian title has not been extinguished" (4 Stat. 729). Although this Court's discussion apparently assumes that the definition in Section 1 does not include any areas within the geographic limits of any state east of the Mississippi,[4] we believe that the definitional language is equally susceptible to the interpretation that Indian country includes all Indian lands that are within the geographical bounds of a state, but not within its ordinary political jurisdiction. At the very least this question is, as the leading authority on Indian law acknowledges, "not free from doubt," F. Cohen, *Handbook of Federal Indian Law* 6 (1942) (footnote omitted), and this Court's prior decisions offer substantial support for the view that Indian country includes lands within the geographic bounds of the States. See *Ex parte Crow Dog*, 109 U.S. 556, 561-562 (1883); *Bates* v. *Clark*, 95 U.S. 204, 207-209 (1877); *The New York Indians*, 72 U.S. (5 Wall.) 761, 770-771 (1866); cf. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 118-124 (1960); *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913).

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[4]The opinion states (slip op. 12; emphasis added):

> Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194 was "intended to apply to the whole Indian country, as defined in the first section." H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished. . . ." Although this definition was discarded in the Revised Statutes, see R. S. 5596, *it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.*

The interpretation we have suggested would be consistent with Justice McLean's analysis of the Nonintercourse Act of 1802, ch. 13, 2 Stat. 139 *et seq.*, in his concurring opinion in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 589 (1832) (which was written just two years prior to the enactment of the Nonintercourse Act of 1834):

> Does the intercourse law of 1802 apply to the Indians who live within the limits of Georgia? The 19th section of that act provides, "that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." This provision, it has been supposed, excepts from the operation of the law, the Indian lands which lie within any state. A moment's reflection will show that this construction is most clearly erroneous. To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and *within the ordinary jurisdiction of a state; not only within the limits of a state, but within the common exercise of its jurisdiction.* No one will pretend, that this was the situation of the Cherokees who lived within the state of Georgia in 1802; nor, indeed, that such is their present situation. If, then, they are not embraced by the exception, all the provisions of the act of 1802 apply to them.

Although Justice McLean was discussing the predecessor to the 1834 Act, we know of no evidence that the 1834 Act was intended to have a narrower scope than its predecessor.

Moreover, even assuming that the definition of Indian country in Section 1 of the 1834 Act was intended to be narrower than that in the 1802 Act (which was at issue in *Worcester* v. *Georgia*), the analysis of the geographic applicability of Nonintercourse Act should also take account of the proviso in Section 29 of the 1834 Act, 4 Stat. 734, which states that the repeal of the 1802 Nonintercourse Act "shall not * * * impair or affect the intercourse act of eighteen hundred and two, *so far as the same relates to or concerns Indian tribes residing east of the Mississippi*" (emphasis added).[5] At least as to the provision in question in the present case — now codified as 25 U.S.C. 194 — this Court concluded (slip op. 9) that Congress intended the version incorporated in the 1834 Act to have the same meaning as the version in the 1802 Act, which *could* be applied in the eastern states under Section 29, if the 1834 version were not applicable.

3. The Court's opinion also assumes that Section 194 (Section 22 of the 1834 Act) would be applicable only in Indian country. But this is far from clear. In contrast to many other sections of the 1834 Act which were expressly made applicable in "Indian country,"[6] Section 22 made no reference to Indian

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[5] Because this portion of Section 29 was adopted as a Senate floor amendment, it was not discussed in the House Committee Report cited by this Court in its discussion of the geographic applicability of the Act. See note 4, *supra*.

[6] See, e.g., Section 2, 4 Stat. 729 (no person permitted to trade "in Indian country" without a license); Section 3, 4 Stat. 729 (license to trade may be refused if it would be improper to permit applicant "to reside in the Indian country"); Section 4, 4 Stat. 729-730 (non-Indian who attempts "to reside in the Indian country" without a license shall forfeit his goods); Section 6, 4 Stat. 730 (foreigners must obtain passports to "go into the Indian country"); Section 7, 4 Stat. 730 (prohibition against non-Indians bartering "within the Indian country"); Section 10, 4 Stat. 730 (authorizing the forcible removal of persons "from the Indian country"); Section 16, 4 Stat. 731 (commission of a crime "within the Indian country"); Section 17, 4 Stat. 731 (indemnification for destruction of property "within the Indian country").

country. To the contrary, like a few other sections of the Act,[7] it was worded broadly without any suggestion of a geographic limitation:

> * * * in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

4. We have pointed up some of the problems involved in defining the geographic scope of the 1834 Act without attempting to resolve them, or suggesting that this Court should do so here. On the contrary, it was never disputed that, as a matter of geography, the Act applied to the Omaha Reservation, and it is therefore unnecessary for this Court to determine which areas are reached by the several provisions of the Act. Our submission is simply that the Court should withdraw the passage of its opinion that may be read as prejudging a number of cases pending in other courts.[8]

Respectfully submitted,
WADE H. MCCREE, JR.
Solicitor General

JULY 1979

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[7] E.g., Section 12, 4 Stat. 730 (purchases or grants from Indian tribes invalid unless made by treaty or convention; includes express reference to "agents of any state" who may be present when treaties are agreed upon); Section 13, 4 Stat 731 (prohibition against any person sending messages to Indian tribe, chief, or individual intending to incite treaty violations or disturb the peace); Section 15, 7 Stat. 731 (prohibition against person "living among the Indians, or elsewhere within the territory of the United States" corresponding with foreign powers who want tribes to go to war with the United States).

[8] Indeed, we are informed that the State of Maine has already filed an amicus brief in *Mohegan Tribe* v. *Connecticut*, Civil No. H-77-434 (D. Conn.), citing this portion of the Court's opinion in support of the argument that the Nonintercourse Acts did not apply in the eastern States.

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FILED
MAY 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1365

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT, PETITIONER

v.

MOHEGAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General

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QUESTION PRESENTED

Whether the Nonintercourse Acts, now codified in 25 U.S.C. 177, which, since 1790, have prohibited the conveyance of land held by an Indian tribe without the approval of the United States, applied to land occupied by an Indian tribe in Connecticut.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1365

STATE OF CONNECTICUT, PETITIONER

v.

MOHEGAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of March 30, 1981.

STATEMENT

This action was filed on August 31, 1977, by respondent, identified as the "Mohegan Tribe of Indians," to obtain possession of approximately 600 acres of State-owned land in the Town of Montville, Connecticut. Respondent contends that this land was unlawfully acquired from the Mohegan Tribe without the approval of the United States (Complaint, ¶¶ 1, 6, 6(h)). The Mohegan Tribe of Indians lived in eastern Connecticut in colonial times and had contacts with white settlers as early as the 1660's. See generally 15 *Handbook of North American Indians* 172-173, 181-182 (Smithsonian Institution 1978). This litigation apparently was brought at the direction of one John E. Hamilton, who is alleged to be the Grand Sachem of the Tribe for his lifetime and, in that capacity, to have primary if not sole authority to manage the Tribe's affairs, "assertions of non-Mohegan

Indians and others to the contrary notwithstanding" (Complaint, ¶ 8).[1]

Respondent's claim rests in part on provisions in the various Trade and Intercourse Acts adopted by Congress beginning in 1790. Temporary versions of those Acts were passed in 1790, 1793, 1796 and 1799.[2] In 1802, Congress enacted a "permanent" Trade and Intercourse Act (Act of Mar. 30, 1802, ch. 13, 2 Stat. 139), and in 1834, Congress enacted a revised and expanded Trade and Intercourse Act (Act of June 30, 1834, ch. 161, 4 Stat. 729). Each of these Acts included a section, commonly called the "Nonintercourse Act" (see *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974)), that prohibited the transfer of Indian land without the permission of the United States.[3]

The complaint alleges that the 600 acres claimed were owned by the Mohegan Tribe from time immemorial and in 1790, when the first Nonintercourse Act was enacted, but that the land subsequently passed out of the Tribe's

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[1] Paragraph 8 of the complaint states in full:

> 8. Plaintiff Mohegan Tribe of Indians (hereinafter the "Tribe") is an Indian Tribe which has resided in the State of Connecticut since time immemorial. Its Grand Sachem for his lifetime, is John E. Hamilton, now of Waterford, New London County, Connecticut; and the assertions of non-Mohegan Indians and others to the contrary notwithstanding, plaintiffs' [sic] affairs are lawfully managed only by the said Grand Sachem and such tribal authority as he and tribal custom have established long prior to the present decade.

As we explain below (see pages 11-12, *infra*), there appears to be some question whether the Mohegan Tribe continues to exist as an entity that may invoke the prohibitions against alienation of Indian land without federal approval.

[2] See note 3, *infra*.

[3] Act of July 22, 1790, ch. 33, Section 4, 1 Stat. 138 (Pet. App. 54a); Act of Mar. 1, 1793, ch. 19, Section 8, 1 Stat. 330 (Pet. App. 58a-59a); Act of May 19, 1796, ch. 30, Section 12, 1 Stat. 472 (Pet. App. 66a-67a); Act of Mar. 3, 1799, ch. 46, Section 12, 1 Stat. 746 (Pet. App. 72a); Act of Mar. 30, 1802, ch. 13, Section 12, 2 Stat. 143 (Pet. App. 77a); Act of June 30, 1834, ch. 161, Section 12, 4 Stat. 730 (Pet. App. 82a).

ownership without the approval of the United States required by the Constitution and the Nonintercourse Acts, now codified at 25 U.S.C. 177 (Complaint, ¶¶ 3, 12, 19-21).[4] As relief, respondent seeks a declaration that it has the right to possession of the 600 acres and that the State's title to the land is void; an order restoring possession of the land to respondent and granting respondent rents and profits from the land; and such other relief as the court deems just (Complaint, at 10-11).[5]

In its answer, the State denies most of the factual allegations in the complaint, including the claim that ownership of the subject land was transferred to the State without the required consent of the United States (Answer, ¶ 4 (denying the allegations in Complaint, ¶ 20)). In addition, as an affirmative defense, the State submits that respondent lacks standing "to assert the purported rights of an alleged Mohegan Tribe of Indians" and that respondent's claim "is barred by the federal common law defense of laches" (Answer, ¶¶ 6, 7).

On November 14, 1978, the State filed a motion to dismiss the complaint for failure to state a claim under 25 U.S.C. 177. The substance of the argument was that none of the restraints on alienation contained in the Nonintercourse Acts applied to Indian lands in the State of Connecticut but, instead, were intended to reach only Indian tribes on the frontier. The district court denied the motion to dismiss (Pet. App. 30a-52a). The court

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[4] The precise dates when the land passed from ownership of the Tribe are not set out in the complaint, although apparently the transfers took place after 1860. Paragraph 18 of the complaint alleges that the lands sequestered for the Tribe consisted of approximately 2100 acres, according to a state survey conducted in 1860, and that "[t]he defendant State purported also now to allot, re-allot and/or confirm much of this acreage to the several Indians of the Tribe." Paragraph 19 then alleges that through various mesne conveyances, the acreage involved came into record ownership of the State.

[5] Paragraph 7 of the complaint states that respondent might also initiate similar actions against other landowners and that the total amount of land involved would approximate 2550 acres.

ruled that the Nonintercourse Acts applied to the transfer of Indian tribal lands throughout the United States.

The district court subsequently certified the statutory question for interlocutory appeal, pursuant to 28 U.S.C. 1292(b) (Pet. App. 3a). The court of appeals affirmed (Pet. App. 1a-29a), concluding that the restraints on alienation of Indian land contained in the Nonintercourse Acts applied throughout the United States. The court of appeals also rejected the State's argument based on language in the various Trade and Intercourse Acts exempting from the statutory restraints "any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states" (Section 19 of the 1802 Act, 2 Stat. 145). In the court's view, this exception did not encompass land sales, but was limited to ordinary commercial transactions which might be carried on between Indians and surrounding non-Indian communities (Pet. App. 26a-29a).

ARGUMENT

The decision of the court of appeals that the statutory restraints on alienation of Indian land without the consent of the United States applied in the original 13 states is correct and does not conflict with the decision of any other court of appeals. Moreover, although perhaps interesting as a matter of historical and intellectual debate, the continuing importance of the issue is very doubtful. And, in any event, the present case, still at an interlocutory, indeed very preliminary, stage, is an inappropriate vehicle for resolving the question. In the circumstances, we urge the Court to decline review.

1. One reason to doubt the recurring importance of the statutory question decided below is that the validity of Indian land sales, like those challenged here and in similar cases, most probably does not depend upon the coverage of the Nonintercourse Acts. To be sure, the amenability of the purchaser to criminal penalties turns on those Acts. But, quite independently of any statutory

restraint, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and any such attempted transaction is accordingly void as a matter of law, without reference to the Nonintercourse Acts. Thus, in this case, the respondent pleaded the ineffectiveness of any land sales under the Constitution, and no decision here of the statutory issue can affect that fundamental objection, not yet addressed by the courts below. And the same principle presumably will govern any other like possessory land claims.

The principle that an Indian tribe's right to occupy aboriginal lands—its Indian title—cannot be extinguished without the approval of the federal government antedates the statutory restraints on alienation contained in the Nonintercourse Acts and now codified in 25 U.S.C. 177. The exclusive authority of the federal government to extinguish Indian title is rooted in the Constitution itself and in the necessary attributes of sovereignty that passed to the federal government upon formation of the Union and adoption of the Constitution. The Court reaffirmed this rule most recently in *Oneida Indian Nation* v. *County of Oneida*, *supra*, 414 U.S. at 667-668 (footnote omitted):

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. * * *

> The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

See also *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345-346 (1941); *United States* v. *Kagama*, 118 U.S. 375, 381 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832); *id.* at 584 (McLean, J.); *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823);[6] cf. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978).

Moreover, the Court held in *Oneida* that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13" (414 U.S. at 670), even though fee title to land in the original states and the preemptive right to purchase land from the Indians was in the states (*ibid.*). Accordingly, quite aside from the restraints in the Nonintercourse Acts, Indian title to land in the original 13 states could not be extinguished without the consent of the

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[6] In *Johnson* v. *McIntosh*, the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775 because those grants were contrary to the accepted principle that Indian title could be extinguished only with the consent of the general government. See *Oneida*, *supra*, 414 U.S. at 669. These grants predated the passage of the first Nonintercourse Act in 1790 and, indeed, the formation of the Union. Significantly, the Court rejected the argument that acts of several colonial assemblies prohibiting purchases from the Indians indicated that Indian deeds would be valid in the absence of such statutory prohibitions. To the contrary, the Court concluded that "the fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy" (21 U.S. (8 Wheat.) at 604). By the same token, the enactment by Congress of restraints on alienation in the first and subsequent Nonintercourse Acts merely confirms the exclusive authority to extinguish Indian title that resides in the federal sovereign.

federal government. Respondent Mohegan Tribe invokes this principle in the present case: its claim to possession of the 600 acres in suit is based not only on 25 U.S.C. 177, but also on "prohibitions against alienation or extinction of Indian title or right of occupancy except with [the] concurrence of the United States, as encompassed within the provisions of Article I, § 8 of the Constitution of the United States" (Complaint, ¶ 3).[7]

Therefore, even if this Court were to grant the State's petition and conclude that the Nonintercourse Acts did not apply to transfers of the 600 acres in suit, respondent's claim that the alienation of that land nevertheless violated the constitutionally based rule would remain to be decided in the courts below. Because a decision in the State's favor therefore would not finally dipose of respondent's claim to possession of the land—or any like claim by other eastern tribes—the Court should deny review on the statutory issue at this interlocutory stage.

2. It is equally relevant to stress the very limited prospects of substantial further litigation that might be affected by the Court's decision in this case, even assuming the only issue now presented for review were dispositive. Contrary to the State's contention, there are very few unresolved cases involving Indian land claims in the eastern states, and there is, moreover, good reason to

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[7] The reference in the complaint to Article I, Section 8, of the Constitution apparently is to Clause 3 of that Section, the Commerce Clause, which gives Congress power to regulate commerce "with the Indian Tribes." The Commerce Clause is not, of course, the sole source of federal authority in this area. For example, the Treaty Clause (Article II, Section 2, Clause 2), and the dependent status of the Indians (*United States* v. *Kagama*, *supra*, 118 U.S. at 383-384; *United States* v. *Wheeler*, *supra*, 435 U.S. at 326) are additional sources of such authority. Accordingly, although the federal government's exclusive authority to extinguish Indian title finds ample support in the Commerce Clause, *Oneida* establishes that this authority flows as well from the nature of the sovereign's relation to Indians occupying aboriginal lands within the United States.

anticipate legislative solutions of the few outstanding controversies.

The largest of the eastern claims—those of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians in Maine—were settled by comprehensive legislation enacted by Congress last October. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 *et seq.* Similar legislation enacted in 1978 extinguished all aboriginal claims in Rhode Island. Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, Section 13, 92 Stat. 817, 25 U.S.C. (Supp. III) 1712. See also Act of Nov. 24, 1980, Pub. L. No. 96-484, 94 Stat. 2365 (approving a settlement of an aboriginal claim by the Pamunkey Indian Tribe of Virginia). The other major eastern land claims are those of the Oneida Nation and other Iroquois groups in New York. But petitioner concedes (Pet. 24) that the lands in question there were within "Indian country" as petitioner uses that term and, therefore, that the New York claims would not be affected by a decision in favor of the State of Connecticut in this case. See also *The New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527 (N.D. N.Y. 1977), on remand from 414 U.S. 661 (1974). Still other eastern land claims have been unsuccessful in court because of the failure of the plaintiff to establish its tribal status. *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979); *Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977), aff'd, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979).

The remaining eastern claims cited by petitioner (Pet. 4) and amici State of South Carolina, *et al.* (Br. 5-7),[8]

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[8] We are not aware of other pending cases in the east, aside from those cited, that would be affected by Connecticut's argument here that lands east of the frontier were not covered by the Nonintercourse Acts. Amici State of South Carolina, *et al.*, cite (Br. 6, n.15) figures furnished by the Department of the Interior and printed in a committee report on the bill extending the statute of limitations in 28 U.S.C. 2415(a) for the United States to bring damage actions on behalf of Indian tribes. The Department reported that

are two relatively small claims in Connecticut and one in Massachusetts,[9] and claims by the Seminole Nation in Florida[10] and the Catawba Tribe in South Carolina.[11] We have been informed by counsel for the tribes in the two Connecticut cases and the Massachusetts case that negotiations are now underway with affected landowners to settle those claims. Similarly, we have been informed by the Department of the Interior that settlement discussions have taken place regarding the Florida claims and that a discussion draft settlement proposal has been prepared. A bill, H.R. 3274 (96th Cong., 1st Sess. (1979)), was introduced in the 96th Congress to settle the South Carolina claims, and hearings were held on that bill in the summer of 1979. Subsequently, in July 1980, a state legislative task force prepared a settlement proposal to be implemented by state and federal legislation. Although settlement discussions based on this proposal subsequently were broken off and the Catawba Tribe filed suit in October of last year seeking possession of 140,000 acres of land, there is no reason to believe that settlement of this claim has been effectively foreclosed by any of the parties.

Voluntary settlement by the federal government, the tribes, the states, and affected landowners surely is a desirable way to resolve these claims. This process is

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it was processing some 9768 Indian claims and that more than 5000 additional claims remained to be inventoried. S. Rep. No. 96-569, 96th Cong., 2d Sess. 8 (1980). We have been informed by the Department of the Interior that the vast majority of these claims are by individual Indians, mostly allottees of lands in the west, and therefore do not raise issues similar to those involved in tribal aboriginal claims in the east.

[9] *Western Pequot Tribe of Indians* v. *Holdridge Enterprises, Inc.*, Civil No. H-76-193 (D. Conn., filed Mar. 27, 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Wampanoag Tribe of Gay Head* v. *Town of Gay Head*, Civil No. 74-5826-G (D. Mass., filed Nov. 28, 1974).

[10] *Seminole Indians of Florida* v. *State of Florida*, Case No. 78-6116-Civ.-N.R. (S.D. Fla.).

[11] *Catawba Tribe of South Carolina* v. *State of South Carolina*, Civil Action No. 80-2050-6 (D. S.C., filed Oct. 28, 1980).

subject to the oversight of the political branches of the federal government, which are in a position to weigh the equities of the parties from a broad historical—and political—perspective. Those branches, too, may approve accommodations among competing interests based on relative hardships, perceived injustices, and other factors that a court might not be able to consider if it were to confine its focus only to a tribe's bare legal claim to possession based on the Nonintercourse Acts or unextinguished aboriginal title. The settlement process in the various states has not been without certain disagreements, as could be expected in any negotiations. But the results reached thus far demonstrate that the process is effective and that it is reasonable to anticipate further progress to resolve all of the eastern claims.

Congress has, moreover, demonstrated that it is fully prepared to enact appropriate settlement legislation extinguishing aboriginal claims to eastern land when the parties involved come into agreement, and Congress could, of course, extinguish aboriginal claims unilaterally if negotiations were not fruitful and circumstances so required. Thus, there is little possibility of a significant disruption of the pattern of private land ownership in areas subject to aboriginal claims. Accordingly, review by this Court is not necessary in order to resolve the various eastern land claims.

3. The instant petition also does not present an appropriate vehicle for review of the scope of the Nonintercourse Acts and the validity of eastern Indian land claims. On the one hand, as we have pointed out above, even if the issue of statutory interpretation were decided in the State's favor, there would remain to be resolved respondent's claim that federal consent is required for the extinguishment of Indian title independently of the Nonintercourse Acts. On the other hand, because the case is at the most preliminary of stages, respondent ultimately may be unable to prove its case on the merits.

The record contains nothing beyond the allegations in paragraphs 12-19 of the complaint to establish that the 600 acres in suit were in fact part of the Mohegan Tribe's

aboriginal homeland. And the record does not even contain any allegations, much less findings, regarding how the 600 acres came to be held by the State or the degree, if any, of federal involvement or acquiescence in the conveyances. It is also likely that the State would seek to establish at trial that aboriginal title to the lands in question was effectively extinguished by various actions taken by Connecticut before the exclusive authority to extinguish Indian title to this land passed to the federal government. Thus, the Court is called upon to interpret the different Nonintercourse Acts in a virtual factual vacuum.

In addition, the lower courts have held that one of the elements of a prima facie case under 25 U.S.C. 177 is a showing that the plaintiff "is or represents an Indian 'tribe' within the meaning of the Act" (*Epps* v. *Andrus*, *supra*, 611 F.2d at 917, quoting *Oneida Indian Nation* v. *County of Oneida*, *supra*, 434 F. Supp. at 537, and *Mashpee Tribe* v. *New Seabury Corp.*, *supra*, 427 F. Supp. at 902). In the present case, there appears to be some doubt about the current status of the Mohegan Tribe and the standing of respondent to bring the instant action as, or on behalf of, that Tribe. In paragraph 6 of its answer, the State contends that respondent does not have standing "to assert the purported rights of an alleged Mohegan Tribe of Indians."

Although we express no view on the current status of the Tribe at this stage of the litigation, the Department of the Interior informs us that it has not acknowledged that the Mohegan Tribe now constitutes an Indian tribe as a distinct racial or cultural entity and that it therefore has not acknowledged any federal trust relationship with an entity known as the Mohegan Tribe.[12] The Department of

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[12] This case therefore differs from *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975), where it was stipulated that the Passamaquoddy Tribe in Maine was a "tribe" racially and culturally. *Id.* at 376-377. The court of appeals in that case merely rejected the argument that land transactions by a group conceded to be an Indian tribe are not covered by 25 U.S.C. 177 unless the tribe is formally "recognized" by the federal government. 528 F.2d at 377-379.

the Interior has promulgated regulations establishing procedures and standards under which Indian organizations may be acknowledged as Indian tribal entities. 25 C.F.R. Part 54. Pursuant to these regulations, an entity identified as the "Mohegan Indian Group," through Mr. John E. Hamilton (see Complaint, ¶ 8, quoted at note 1, *supra*), is among the dozens of groups that have petitioned for acknowledgment of tribal status under these regulations. See 44 Fed. Reg. 116 (1979). We have been informed that despite the Department's request (*ibid.*), the Mohegan group has not supplied any data to support its petition for tribal status, other than a letter from counsel, who is also counsel for respondent herein.[13] If respondent similarly fails to make a showing in the instant litigation of its current status as a tribe, its claim under 25 U.S.C. 177 will fail for this reason alone. See *Epps* v. *Andrus*, *supra*; *Mashpee Tribe* v. *New Seabury Corp.*, *supra*. In that case, there would of course be no occasion for this Court to consider whether the Nonintercourse Acts applied to the conveyances of the land involved.

4. In any event, the State's argument that the Nonintercourse Acts did not apply in Connecticut is incorrect. Before turning to the terms of the statutory provisions, however, there are two features in the background of the Acts that weigh strongly against limiting their geographic reach.

a. First, as we have explained, in *Oneida* (414 U.S. at 670) this Court held the "rudimentary proposition[]" that extinguishment of Indian title requires approval of the federal government applicable in the original 13 states, even though these states owned the fee to the lands or were possessed of the right of preemption. This uni-

[13] Paragraph 8 of the complaint, quoted in note 1, *supra*, also suggests that there is some question regarding the authority of Mr. Hamilton, the alleged Grand Sachem of the Tribe, to speak for the Tribe in these matters, even assuming that the Tribe continues to exist as a distinct entity. This issue likewise should be resolved by the district court before resolution of respondent's claim. If this case is not being pursued at the direction of an authorized representative of the Tribe, a decision on the merits presumably would not bind the Tribe.

form principle therefore controlled, upon formation of the Union, wherever Indian title had not been extinguished by the prior sovereign. Since the Nonintercourse Acts of 1790 and later years confirm and implement this rule, it is reasonable to expect that Congress would "assert[] the primacy of federal law" (*Oneida*, *supra*, 414 U.S. at 667) in the original 13 states to the same geographic extent, *i.e.*, wherever Indian title had not been extinguished by the prior sovereign, whether or not beyond the frontier.

Second, the circumstances surrounding adoption of the Indian Commerce Clause also weigh against limiting the geographic scope of the Nonintercourse Acts. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled shall * * * have the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated * * *." In contrast, the Commerce Clause broadly authorizes Congress "[t]o regulate Commerce * * * with the Indian Tribes." The limitations in the Articles of Confederation were deleted for the very purpose of removing any doubts about the supremacy of federal authority over Indians within the borders of the original states. As Madison explained in *The Federalist* No. 42, at 284 (J. Cooke ed. 1961):

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. * * * What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

See also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.)

515, 558-559 (1832); *United States* v. *43 Gallons of Whiskey*, 93 U.S 188, 194 (1876). In light of this deliberate action of the Constitutional Convention removing obstacles to Congress' authority over Indian affairs within the boundaries of the original 13 states, it would have been quite surprising for Congress, in enacting the first significant implementing legislation, just three years later, to have wholly excluded from federal regulation any matters involving Indians who might be thought to have been "members" of the original 13 states or who might otherwise have been subject to the legislative jurisdiction of those states.

b. Certainly nothing in the language of the Nonintercourse Acts suggests that they were inapplicable to certain lands in the original 13 states, even though Indian title to those lands had not been extinguished. Section 4 of the 1790 Act provided that any sale of Indian land to any person "or to any state, whether having the right of preemption to such lands or not," shall not be valid. The right of preemption existed in the states with respect to land *within* their borders to which Indian title had not been extinguished. *Oneida*, *supra*, 414 U.S. at 670. Subsequent re-enactments of the first Nonintercourse Act are similarly expansive. Section 12 of the 1796, 1799, and 1802 Acts all provided that "*no* purchase, grant, lease or other conveyance of lands * * * from *any* * * * nation or tribe of Indians, within the bounds of the United States," shall be valid unless made by treaty or convention (emphasis added). With minor variations, these sections then provided criminal sanctions against treating "with *any* such Indian nation, or tribe of Indians, for the title or purchase of *any* lands by them held or claimed" (*ibid.*). The italicized words are hardly indicative of an intent to exclude some or all land held by Indians in the original states.

Moreover, all of the Nonintercourse Acts enacted after 1790 contained a proviso to the criminal sanction permitting the agents of a state who may be present at a treaty held with Indians under authority of the United States, with approval of the commissioner representing the

United States, "to propose to, and adjust with the Indians, the compensation to be made, *for their claims to lands within such state*, which shall be extinguished by the treaty" (*ibid.*). The proviso makes abundantly clear that lands "within" the states were covered by the reprohibition against alienation without federal approval.

The only changes made when the nonintercourse provision was reenacted in Section 12 of the 1834 Act was the deletion of the reference to nations or tribes "within the bounds of the United States." But this does not detract from the all-inclusive nature of the remaining portions of that or prior Nonintercourse Acts. More importantly, however, Section 29 of the 1834 Act, ch. 161, 4 Stat. 734, although it repeals the 1802 Act, provides that this repeal shall not "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi." Thus, after enactment of the 1834 Act, lands held by tribes in Connecticut and other states east of the Mississippi continued to be subject to Section 12 of the 1802 Act, which expressly applied to *any* purchase of land from *any* Indian tribe "within the bounds of the United States" (emphasis added).

The State nonetheless argues (Pet. 5-25) that all of the provisions of the Trade and Intercourse Acts, including the prohibitions against Indian land transfers, applied only to what it terms "Indian country," meaning territory west of the "frontier" or, in later years, west of boundary lines established in treaties with certain Indian tribes. Thus, the State contends that even if the various Nonintercourse Acts applied to some of the territory of the original states, they applied only to those portions that were west of the "frontier" or treaty boundaries and were therefore in "Indian country," as the State uses the term.

Nothing in the text of any of the Nonintercourse Acts suggests a rule that the statutory requirement of federal approval for extinguishment of Indian title would apply in some parts of a state but not in others. But the State suggests (Pet. 5-6) that a purpose so to limit

the nonintercourse provisions may be inferred from language in a different section of the Trade and Intercourse Acts. It points out that the first section of the 1796, 1799, and 1802 Acts each described a boundary line established by treaty between the United States and various Indian tribes. Section 1 of each Act then provided that if that line should be varied by a later treaty, "then all the provisions contained in this act, shall be construed to apply to said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited." The State contends that the reference to "all the provisions" of the Act must mean that the nonintercourse provisions in Section 12 of each Act applied only west of the boundary so described.

The text of the proviso itself does not support the reading the State would give it. The proviso does *not* say that "all the provisions" of the Act shall be construed to apply only *west* of the boundary line; if Congress had intended such an important limitation, it surely would have said so directly. Rather, the proviso states only that the provisions of the Act shall apply "*to* said line" (emphasis added), and then only "in the same manner, as the said provisions now apply to the boundary line". In other words, those sections of the Act that stated a prohibition by specific reference *to* the boundary line would apply "in the same manner" if the line were later redrawn.[14] Other sections, such as the noninter-

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[14] See, *e.g.*, Section 2 of the 1796, 1799, and 1802 Acts, making it unlawful for a citizen or resident of the United States or its territories to "cross over, or go within the said boundary line, to hunt, or in any wise destroy the game" (1 Stat. 470, 744; 2 Stat. 141).

The State suggests (Pet. 6-7) that it would be "paradoxical" for Congress to have confined certain provisions of the Trade and Intercourse Acts to areas on the Indian side of the boundary line described in Section 1 of the Act, yet applied other provisions of the Act throughout the United States. However, we see no paradox in Congress' tailoring the application of each prohibition to the scope of the particular problem it was intended to address. For example, because of the likelihood that Indians might be taken advantage of in ordinary commercial dealings irrespective of where they might occur, it was reasonable that Congress should

course provisions in Sections 12 of the Acts, which did not refer to the boundary line, consequently would be unaffected by a subsequent shift of that line.[15] The court of appeals found this interpretation of the proviso to be "quite plain" when it is "read as a whole." (Pet. App. 16a).

In an effort to overcome the flaws in its argument based on the text of the Trade and Intercourse Acts, the State attempts to show (Pet. 8-13) that the purpose of those Acts was to preserve peace on the frontier and that all provisions of the Acts, including those banning land transfers, must therefore be limited in their application to Indians along the frontier. But the very title of the 1796 and subsequent Acts, upon which the State relies (Pet. 9-10), was "An Act to regulate Trade and Intercourse with the Indian Tribes, *and* to preserve Peace on the Frontiers" (emphasis added), thereby confirming that the purpose the State identifies was not all that Congress sought to accomplish. Moreover, as the court of appeals explained (Pet. App. 18a-19a),

> there is nothing inconsistent with these views [that a principal purpose of the Acts was to preserve peace on the frontier] in reading the Nonintercourse statute, as its language suggests, to include encroachment upon Indian lands throughout the United States. Such a promise may well have been thought

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proscribe throughout the United States the purchase from them of such essentials as guns or other articles used in hunting, instruments of husbandry, and cooking utensils. See Section 9 of the 1802 Act, 2 Stat. 142. The same rationale, and the independent requirement that the federal sovereign must consent to the extinguishment of Indian title, explains why Congress would apply the restraint on alienation of land throughout the United States.

[15] Of course, a westward shift of the boundary line pursuant to a treaty with an Indian tribe would often be coupled with an extinguishment of Indian title or claims to land in the ceded area. In these circumstances, the Nonintercourse Act in effect at the time would not subsequently have applied to the ceded land because a valid treaty would have extinguished Indian title to it in the very manner contemplated by the Nonintercourse Act itself. Accordingly, the shift of the boundary would have been an *effect*, not the *cause*, of the inapplicability of the Nonintercourse Act in the area.

> best to mollify the apprehensions of Indians on the frontier as well as those in the settled regions. Surely it would have furnished evidence to the Indians of the seriousness of the federal government's intention to regulate land sales, a matter of great concern to the Indians.

The statements of officials of the Executive Branch upon which the State relies (Pet. 13-18) for the proposition that the restraints on alienation of Indian land did not apply in Connecticut do not for the most part even concern the Trade and Intercourse Acts, much less their nonintercourse provisions. They therefore are of no relevance to the issue in this case.[16] The only two statements that do refer to the Trade and Intercourse Acts (Pet. 16-17) are merely general descriptions of the boundary line in the 1802 Act and do not concern the restraints on alienation in Section 12 of that Act.[17]

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[16] Thus, that President Washington decided against the use of federal funds to make Catholic priests available in Massachusetts because that State had provided care and protection for Indians there (see Pet. 14) has no bearing on whether Indian title can be extinguished without federal approval. The 1899 and 1931 letters from the Commissioners of Indian Affairs, cited by the State (Pet. 17-18 & n.19), are irrelevant for the same reason. Similarly, that Secretary of War Calhoun did not consider certain eastern tribes to be within the scope of President Monroe's plan for removing Indians to areas west of the Mississippi (see Pet. 16) hardly establishes that the lands of those who were to remain would not be covered by Section 12 of the 1802 Act. Henry Knox's statement in a 1789 letter to President Washington that the states would retain the right of preemption to lands within their borders (see Pet. 15) also has no bearing on the geographic applicability of restraints on alienation of Indian land; as explained above (see pages 14-15, *supra*), the Nonintercourse Acts applied even where a state had the right of preemption. Finally, the article by Joseph Blunt describing the status of Indian tribes during the period of the Articles of Confederation (see Pet. 17) obviously has no bearing on the interpretation of a statute passed pursuant to Congress' greatly enhanced powers over Indian affairs under the Constitution.

[17] The state also relies (Pet. 19-20) on *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358 (1829), for the proposition that all of the provisions of the 1802 Act applied to Indian country west of the boundary described in Section

Nor, contrary to the State's contention (Pet. 21), is the decision below in conflict with this Court's decision in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667-668 (1979). The Court there held that 25 U.S.C. 194, which provides that the burden of proof shall rest on the white person in a property dispute with an Indian where the Indian shows previous possession or ownership, does not apply in a dispute between an Indian tribe and a state. In support of that conclusion, the Court observed that 25 U.S.C. 194 was derived from Section 22 of the 1834 Trade and Intercourse Act. That Act, the Court stated, "was 'intended to apply to the whole Indian country, as defined in the first section'" (442 U.S. at 667, quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834)), an area that the Court concluded did not in 1834 embrace any of the states (442 U.S. at 668).[18] But as we have explained (see page 15, *supra*), Section 29 of the 1834 Act preserved the 1802 Act insofar as it applied to tribes east of the Mississippi. The 1802 Act was not involved in *Wilson*,[19] and the restraint

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1 of that Act. But the specific provision involved in that case expressly authorized the seizure of goods only in "Indian countries" (Act of May 6, 1822, ch. 58, Section 2, 3 Stat. 682), which the Court construed to be land west of the boundary. The discussion relied upon by the State (Pet. 20, quoting 27 U.S. (2 Pet.) at 369) appears to be but a paraphrase of the proviso to Section 1 and was not, at all events, directed to the special restrictions on land transactions. Section 20 of the 1834 Act (4 Stat. 732), which was at issue in *Bates* v. *Clark*, 95 U.S. 204 (1877) (see Pet. 20), likewise was expressly limited to the introduction of alcohol into *Indian country*.

[18] Section 1 of the 1834 Act (4 Stat. 729) defined Indian country as all land west of the Mississippi River, and not within the states of Missouri and Louisiana or the Arkansas Territory, and that part of the United States east of the Mississippi "and not within any state to which the Indian title has not been extinguished."

[19] Section 22 of the 1834 Act (4 Stat. 733; 25 U.S.C. 194), at issue in *Wilson*, was derived from Section 4 of the Act of May 6, 1822, ch. 58, 3 Stat. 683. Although Sections 1 and 2 of the 1822 Act (3 Stat. 682) amended provisions in the 1802 Trade and Intercourse Act, Section 4 of the 1822 Act did not. That Section therefore apparently was an independent enactment, never incor-

on alienation in Section 12 of that Act was not limited to Indian country.

Finally, we agree with the reasoning of the court of appeals (Pet. App. 26a-29a) that Section 19 of the 1802 Act (2 Stat. 145) did not have the effect of exempting Indian land transactions in Connecticut from the requirement of federal approval. Section 19 provided that nothing in the Act "shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." The phrase "trade or intercourse" refers to ordinary commercial dealings. Practical necessity may have led Congress to except Indians surrounded by non-Indians, and to that extent assimilated among them, from prohibitions on commercial intercourse. But no such necessity required an exception from the requirement of federal approval before the Indians' *lands* could be purchased. And, as the court of appeals explained (Pet. App. 28a-29a), the origins of Section 19 demonstrate that land transactions were not covered by the term "trade or intercourse" or the exception in Section 19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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porated in the 1802 Act, that was simply carried forward in Section 22 of the 1834 Act.

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